APPENDIX A

UNITED STATES DISTRICT COURT

D. HAWAII

Civ. No. 72-3720.

The PEOPLE OF SAIPAN, By and Through HERMAN Q. GUERRERO et al., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF INTERIOR et al., *Governmental Defendants*,

and

CONTINENTAL AIRLINES, INC., a Nevada Corporation, *Corporate Defendant*.

March 20, 1973.

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Order Granting Motions To Dismiss

SAMUEL P. KING, District Judge.

This case involves the application of the National Environmental Policy Act (hereinafter "NEPA"), 42 U.S.C. § 4321 et seq. (Supp. 1973), to the official actions of the High Commissioner of the Trust Territory of the Pacific Islands (hereinafter "Trust Territory").[1] Defendants have moved to dismiss the Complaint on a variety of procedural and substantive grounds. These grounds raise the issues now before the court.

[1] The islands of the Trust Territory are located in the Western Pacific Ocean north of the Equator. There are approximately 96 island units, various small islands or atolls, which are scattered over an oceanic area larger than the continent of Australia or continental United States. The islands total land area, however, is only 687 square miles, and only 64 are regularly inhabited. See Trust Territory of the Pacific Islands 1960, 13th Annual Report to the United Nations (Dept. of State publication 7183, 1961).

The High Commissioner is the highest official in the executive branch of the Trust Territory Government. See *infra* at 655.

Plaintiffs, citizens of the Trust Territory who are residents of Saipan, Mariana Islands, allege that the action of the High Commissioner in approving and later executing a lease agreement with Continental Airlines, Inc. (hereinafter "Continental") to construct and operate a hotel on public land adjacent to Micro Beach, Saipan, unlawfully bypasses NEPA because no environmental impact statement was prepared or considered prior to approval of the lease, and is "an abuse of discretion" within the meaning of the judicial review provisions of the Administrative Procedure Act (hereinafter "APA"), 5 U.S.C. §§ 701-706, because the environmental implications of the project were not given bona fide consideration. It is further alleged that the High Commissioner has an affirmative fiduciary duty to comply with NEPA under the provisions of the Trusteeship Agreement for the Former Japanese Mandated Islands.[2] An injunction is sought prohibiting the implementation of the lease agreement until the environmental impact of the hotel has been studied and evaluated.

In addition to the immediate parties to the lease (Continental and the High Commissioner), plaintiffs have joined as defendants the Department of the Interior, Secretary of the Interior Rogers C. B. Morton and Deputy Assistant Secretary of the Interior for Territorial Affairs Stanley S. Carpenter. As discussed *infra* at 653, plaintiffs assert that the Department of the Interior has responsibility for the civil administration of the Trust Territory and that the High Commissioner acts as an agent of the Department in his role as chief executive of the Trust Territory Government.

On January 10, 1973, this court denied a temporary restraining order after a hearing and requested further brief-

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[2] 61 Stat. 3301 (hereinafter "Trusteeship Agreement"). The Trusteeship Agreement was approved by the Security Council of the United Nations on April 2, 1947, and by the President of the United States on July 18, 1947, pursuant to a Joint Resolution of Congress of that date.

ing on the complex questions of law that had been raised. Thereafter defendants moved to dismiss and argument was heard on February 13, 1973. The hearing on the preliminary injunction was postponed pending decision on the motions to dismiss.

After extensive consideration, it is my reluctant conclusion that: (1) the Trust Territory Government is not a federal agency subject to judicial review under the APA or NEPA, and (2) the Trusteeship Agreement does not vest plaintiffs with individual legal rights which they may assert in this court. For these reasons, jurisdiction is lacking and the motions to dismiss are granted. The other grounds urged in support of dismissal are without merit, and are rejected.

Facts

On the basis of the well pleaded allegations of fact in the Complaint, which are taken as admitted for the purpose of these motions, it appears that sometime prior to October 20, 1970, Continental applied to the Trust Territory Government for permission to lease and build a hotel on public land at a site adjacent to Micro Beach, Saipan.

Micro Beach is a pleasant shaded beach which for many years has been the favorite beach of the people of Saipan. It is an important historical and cultural site and even during the previous German and Japanese administrations, it was set aside as an area to be preserved for use by the people of the island.

Although the hotel site is not directly on the beach, its proximity makes "it inevitable that construction of a hotel there will greatly reduce the desirability of Micro Beach to the people of Saipan and will, as a practical matter, deprive them of use of their most popular beach. In any society, a large increase in the number of persons using a beach or similar recreation area can greatly reduce the desirability of the area as a place to visit and relax. This is particularly true in Saipan, where many of the people,

whether it be because of diffidence, courtesy, general cultural values or a long history of exposure to highhanded outsiders, do not feel free to use a beach occupied by tourists." Complaint ¶ 21.

In addition, it is alleged that construction of the hotel will triple the number of hotel rooms presently on Saipan resulting in further strain on the already overburdened power and water supplies, and damage to the ocean and reef by increased amounts of sewage discharge.

Pursuant to the requirements of the Trust Territory Code (hereinafter "T.T.C."), the Continental application was submitted to the Mariana Islands District Land Advisory Board[3] for its consideration. The Board unanimously recommended against the application suggesting that the area be reserved for public park purposes. This decision was communicated to the District Administrator of the Marianas District[4] and the High Commissioner by

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[3] All members of the Land Advisory Board are Trust Territory citizens and are appointed by the Mariana Islands District Administrator with the advice and consent of the Mariana Islands District Legislature. 67 T.T.C. § 53. See footnote 4, *infra*.

[4] Saipan is part of the Mariana Islands District. For the purpose of administration, the islands of the Trust Territory are grouped into six districts, each with its own administrator and legislature. Subject to all territory-wide laws, the district governments are primarily responsible for support of public education and health, imposition and collection of sales taxes, construction and maintenance of secondary roads, domestic relations, inheritance law, land law, issuance of licenses for wholesale business and liquor control. 3 T.T.C. § 2.

Each district administrator is appointed by and serves at the pleasure of the High Commissioner. 3 T.T.C. § 51. In addition to his duties as representative for the High Commissioner, the district administrator is the chief executive officer of the district government. 3 T.T.C. § 52. (The court is informed that the Code has been amended to require the advice and consent of the Congress of Micronesia for all future appointments of district administrators).

letter dated October 20, 1970. See Exhibit B of the Complaint.

For approximately one year no apparent action on the hotel project was taken. Then on October 15, 1971, a Micronesian News Service [5] release announced that the Trust Territory Government had tentatively approved a lease of the site to Continental "with final approval awaiting receipt of the completed papers." Complaint ¶ 25. Thereafter, protests against the proposal by various elected and community leaders, the Saipan Municipal Council [6] and the Mariana Islands District Legislature were communicated to the Interior Department and the High Commissioner.[7] Nevertheless, the lease was executed by Continental and High Commissioner Johnston on behalf of the Trust Territory Government on January 1, 1972.

The lease is for an initial period of 30 years with options to extend for two additional periods of 10 years each. Lease Agreement, arts. 1 and 2. Continental is granted the right to construct 200 rooms on the premises,[8] *id.* art. 27, and

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[5] The Micronesian News Service is part of the Trust Territory Government's Department of Public Information.

[6] The Saipan Municipal Council represents a third layer of government subordinate to the Trust Territory Government and the Mariana Islands District Government. Such councils are chartered by the High Commissioner when in his opinion such action is warranted by the circumstances and by the stage of development of the community. 4 T.T.C. § 1. They are subject to all territory-wide laws and all district laws of their respective districts. 4 T.T.C. § 51.

[7] Defendants have submitted a petition signed by various people in the Mariana Islands District supporting construction of the hotel. Defendants Exhibit 6. Plaintiffs admit that the project "is not without support" among the people of Saipan.

[8] Plaintiffs allege that the hotel is to be eventually expanded to 500 rooms.

with the prior written permission of the Trust Territory Government to erect on the "public beach and in the waters of the lagoon adjacent thereto, facilities and structures, including docks and ramps related to and connected with marine and beach activities" of Continental's hotel. *Id.* art. 6.

It is undisputed that defendants have not complied with the requirements of NEPA, specifically section 4332(2)(C) which requires that "all agencies of the Federal Government" prepare a detailed environmental impact statement for "major Federal actions significantly affecting the quality of the human environment."

NEPA Is Applicable in the Trust Territory

Defendants first ground in support of their motions to dismiss is that NEPA is not applicable to federal agencies operating in the Trust Territory. They urge this court to reconsider its recent decision in Enewetak v. Laird, 353 F.Supp. 811 (D. Hawaii decided January 19, 1973) holding that NEPA does apply to such agencies. It is argued that because there is no specific language in NEPA extending the statute's coverage to the Trust Territory, this court must restrict its application to the territorial jurisdiction of the United States. Foley Brothers, Inc. v. Filardo, 336 U.S. 281, 69 S.Ct. 575, 93 L.Ed. 680 (1949), is cited for this proposition, particularly language at page 285 of the opinion, 69 S.Ct. at page 576 which states that "the canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . is a valid approach whereby unexpressed congressional intent may be ascertained."

I am not persuaded. In my opinion, defendants misconstrue the thrust of the canon by ignoring the qualifying phrase "unless a contrary intent appears."

The question before the Court in *Foley Brothers* was whether the Eight Hour Law[9] applied to a contract between the United States and a private American contractor for work performed on a construction project in Iraq and Iran. As noted by Justice Frankfurter, a literal reading of the statute would have resulted in its application since by its terms it covered "every contract made to which the United States . . . is a party." 336 U.S. at 291-292, 69 S.Ct. at 581 (concurring opinion). Instead, the Court looked to the Act as a whole, *id.* at 285-286, 69 S.Ct. 575, its legislative history, *id.* at 286-288, 69 S.Ct. 575, and administrative interpretations of it. *Id.* at 288-291, 69 S.Ct. 575. Finding nothing in any of this material that indicated a congressional purpose to extend the Act's coverage beyond the territorial jurisdiction of the United States, the Court concluded that the law was "inapplicable . . . in a foreign country over which the United States has no direct legislative control. . . ."[10] *Id.* at 290, 69 S.Ct. at 580.

Thus the Court did not adopt the mechanical rule proposed by defendants. Rather it looked to all available evidence of legislative intent before it arrived at a decision.

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[9] The Eight Hour Law was repealed August 13, 1962. 76 Stat. 360. It had provided that "[e]very contract hereafter made to which the United States . . . is a party . . . shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor . . . shall be required or permitted to work more than eight hours in any one calendar day upon such work; . . ."

[10] It is interesting to note that while the United States does not have sovereignty in the Trust Territory, it very definitely has legislative control. As noted *infra* at 655, Department of the Interior Order No. 2918, pt. III § 2 provides that the Congress of Micronesia may not enact legislation inconsistent with the "treaties or international agreements" of the United States, "laws of the United States applicable to the Trust Territory," "Executive Orders of the President" and "Orders of the Secretary of the Department of Interior." See also, 2 T.T.C. § 102.

Though a different result was reached, this is exactly the procedure followed in *Enewetak.*[11] Because this court concluded that both the language and legislative history of NEPA evidenced a congressional intent to apply the statute to all areas under United States control, the canon of construction cited by defendants "whereby unexpressed congressional intent may be ascertained" never became an issue.

No other reasons appearing for a reconsideration of this court's decision in *Enewetak,* it is reaffirmed and defendants' arguments rejected.

VENUE IS PROPERLY LAID IN THE DISTRICT OF HAWAII

Defendants Continental and High Commissioner Johnston contend that venue is improperly laid in this district because the Department of the Interior and its officials have not legally or adequately been served with process.

Plaintiffs rely on 28 U.S.C. § 1391(e) (Supp.1973) as authorization for effective extra-territorial service:

> A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may . . . be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

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[11] Indeed, in every reported case requiring judicial interpretation of the applicability of ambiguous legislation to the Trust Territory, the courts have looked to all available evidence to discover the intent of Congress. See Aradanas v. Hogan, 155 F.Supp. 546 (D.Hawaii 1957) (Immigration and Nationality Act); Application of Reyes, 140 F.Supp. 130 (D.Hawaii 1956) (Immigration and Nationality Act); Callas v. United States, 253 F.2d 838 (2d Cir. 1958) (Tort Claims Act); Brunell v. United States, 77 F.Supp. 68 (S.D.N.Y.1948) (Tort Claims Act).

It is first argued that the section is not applicable here because the requirement that "each defendant" be an officer or employee of the United States is violated by the joinder of Continental, a private corporation. Though this argument is supported by the literal language of section 1391(e), it is obviously inconsistent with the spirit and intent of the provision. See Judge Body's discussion in Powelton Civic Home Owners Ass'n v. Department of Housing & Urban Development, 284 F.Supp. 809, 832-834 (E.D.Pa. 1968). The better rule, supported by virtually all courts which have considered this problem,[12] is that the requirement refers only to defendants who are beyond the forum's territorial limits. Thus the presence of Continental is simply not relevant to the extra territorial operation of section 1391(e).[13]

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[12] Powelton Civic Howe Owners Ass'n. v. Department of Housing & Urban Development, *supra* at 832-834; Liberation News Service v. Eastland, 426 F.2d 1379, 1382 n. 5 (2d Cir. 1970); Kletschka v. Driver, 411 F.2d 436, 442 (2d Cir. 1969); Brotherhood of Locomotive Engineers v. Denver & R.G.W. R.R., 290 F.Supp. 612, 615-616 (D.Colo.1968), aff'd. on other grounds, 411 F.2d 1115 (10th Cir. 1969); Coalition for United Community Action v. Romney, 316 F.Supp. 742, 746-747 (N.D.Ill.1970); McKenna v. Udall, 135 U.S.App.D.C. 335, 418 F.2d 1171, 1176 (1969); Heath v. Aspen Skiing Corp., 325 F.Supp. 223, 229 (D.Colo.1971); English v. Town of Huntington, 335 F.Supp. 1369, 1373 (E.D.N.Y.1970), aff'd. on other grounds, 448 F.2d 319 (2d Cir. 1971); Macias v. Finch, 324 F.Supp. 1252, 1254-1255 (N.D.Cal.1970). *Contra*, Chase Savings & Loan Ass'n. v. Federal Home Loan Bank Board, 269 F.Supp. 965, 967 (E.D.Pa.1967).

[13] Defendant Continental resides in this district because it does business here, see 28 U.S.C. § 1391(c) (Supp.1973), and was personally served pursuant to Rules 4(d)(3) and 4(b) of the Federal Rules of Civil Procedure. Defendant High Commissioner Johnston was personally served in this district on January 15, 1973. He has not raised any specific venue objections although he has moved this court to quash a subpoena issued to require the taking of his deposition. In view of my conclusion that the High Commissioner is an official of the Department of the Interior,

Secondly, it is asserted that with respect to the Interior Department and its officials venue is improperly laid in this district because none of the requirements set out in subsections (1) through (4) of section 1391(e) have been met. It is suggested that proper venue would be in Washington, D. C., the official residence of these defendants.

It is not necessary to decide this question because the Interior Department, Secretary Morton and Deputy Assistant Secretary Carpenter have all waived their objections to venue.[14] Because venue is a privilege personal to each defendant, Continental and Johnson are precluded from objecting that venue is improper as to the other defendants. Camp v. Gress, 250 U.S. 308, 39 S.Ct. 478, 63 L.Ed. 997 (1919); McKenna v. Udall, 135 U.S.App.D.C. 335, 418 F.2d 1171, 1176-1177 (1969).

PLAINTIFFS HAVE STANDING

Defendants move on two separate grounds to dismiss the Complaint because plaintiffs lack standing: (1) plaintiffs have failed to allege the requisite interest in the contro-

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infra, at 657-658, he would be subject to extra-territorial service to the same extent as any other official in the Department. While the APA exclusion precludes judicial review in most instances, there is no reason to believe that it provides an exemption from the venue statutes.

[14] The reason for their waiver is found in Exhibit B of the Governmental Defendants Memorandum in Support of Motion to Dismiss which is a letter from the Department of Interior to the Department of Justice dated January 24, 1973. On page 7 it is stated:

> 5. We believe your Department is better qualified to evaluate the venue question. We might note, however, that since *General Constructors* is a valuable precedent for the Hawaii District, it might be better to stay there, particularly since review would be in the Ninth Circuit which we think would be more knowledgeable about and sympathetic to our position than would the D.C. Circuit.

versy as defined by Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 36 (1972); and (2) as nonresident aliens, plaintiffs have no standing to sue, relying on Pauling v. McElroy, 107 U.S.App.D.C. 372, 278 F.2d 252 (1960). Both arguments are without merit.

In Sierra Club v. Morton, *supra,* the Sierra Club sought a declaratory judgment and an injunction to restrain federal officials from approving an extensive skiing development in the Mineral King Valley in the Sequoia National Forest. The Supreme Court held that the Club lacked standing because it had asserted no individualized harm to itself or its members: "Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents." 405 U.S. at 735, 92 S.Ct. at 1366.

In the instant case plaintiffs clearly have alleged facts in the Complaint which satisfy the *Sierra Club* test. Paragraph 3 of the Complaint states that:

> Most of the plaintiffs regularly use Micro Beach in Saipan for swimming, fishing and picnicking, and regard it as one of their favorite beach areas in Saipan. They would be effectively deprived of their use of Micro Beach if construction of the Continental hotel takes place as presently contemplated.

In addition, paragraph 35 alleges that the hotel will create a sewage problem, paragraphs 36 and 37 that it will deleteriously affect the power and water supply, and paragraph 39 that its height will have "a significant aesthetic effect upon the people of Saipan." By such allegations, plaintiffs have shown that they will be "adversely affected" by the construction of the hotel and that they have more than merely general "interest in the problem." See Sierra Club v. Morton, *supra,* 405 U.S. at 739-740, 92 S.Ct. 1361.

Moreover, in view of this court's conclusion that NEPA is applicable in the Trust Territory, plaintiffs' status as nonresident aliens does not detract from their standing to sue. Enewetak v. Laird, *supra* 353 F.Supp. at 820 n. 14. Nor do they lack standing under the APA. Constructores Civiles de Centroamerica, S. A. v. Hannah, 148 U.S.App. D.C. 159, 459 F.2d 1183, 1189-1191 (1972). The footnote in Pauling v. McElroy, *supra* 278 F.2d at 254 n. 3, to the effect that "non-resident aliens . . . plainly cannot appeal to the protection of the Constitution or laws of the United States" is an incomplete statement of the law.[15] There are many instances where nonresident aliens have been allowed to sue in United States courts to protect their property or personal rights.[16] Indeed, the Supreme Court has said that "[a]lien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to

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[15] The District of Columbia Circuit has subsequently "clarified" its holding in Pauling v. McElroy. In Constructores Civiles de Centroamerica, S.A. v. Hannah, *supra* 459 F.2d at 1190 n. 13, it stated:

> Citing Johnson v. Eisentrager, *supra* [339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255], we have denied standing to nonresident aliens *who have not alleged specific threatened injury* in challenging the detonation of a nuclear device. Pauling v. McElroy, 107 U.S.App.D.C. 372, 278 F.2d 252 (1960). (Emphasis added).

[16] See, e.g., Wilderness Society v. Morton, 463 F.2d 1261 (D.C. Cir.1972) (Canadian environmental group allowed to intervene in federal district court suit testing Interior Secretary's compliance with NEPA prior to granting Alaska pipeline permits); Constructores Civiles de Centroamerica, S.A. v. Hannah, *supra* (Honduran corporation had standing to sue Agency for International Development in connection with disqualification of the corporation as a bidder on road construction contract); Puente de Reynosa, S.A. v. City of McAllen, 357 F.2d 43 (5th Cir. 1966) (Mexican corporation owning Mexican end of a Rio Grande River bridge had standing to sue for injunction restraining construction of new bridge by city on grounds that city had failed to secure congressional consent for the new structure).

resort to the courts for the redress of wrongs and the protection of their rights." The Disconto Gesellschaft v. Umbreit, 208 U.S. 570, 578, 28 S.Ct. 337, 339, 52 L.Ed. 625 (1908).

Accordingly, this court will not deny plaintiffs standing in this suit because of their status as nonresident aliens where no such congressional intent is manifested in either NEPA or the APA.

Abstention Not Required

Defendants note that an identical suit is pending in the High Court of the Trust Territory and request that this court abstain from further proceeding until such time as that suit is concluded.

Without getting into the difficult question of what deference is required as a general rule with respect to cases pending in the High Court, it does not appear that abstention is required in this case. Although the case in the High Court arose from the same transaction as did this one, it does not include all the defendants named herein and it appears that the primary issue remaining before that court involves the construction of a Trust Territory statute not at issue here. Moreover, the Chief Justice of the High Court has entered an order denying a motion by Continental and the High Commissioner which sought to enjoin the plaintiffs from pursuing their remedies in this court. He also, on his own motion, stayed further proceedings in the High Court during the pendency of the action in this court.

Under the circumstances, abstention would serve little purpose and might well lead to unnecessary expense and duplication of effort.

The Trust Territory Government Is Not a Federal Agency Subject to Review Under NEPA or the APA

By its terms NEPA is applicable only to major actions of "agencies of the Federal Government." See 42 U.S.C.

§ 4332 (Supp.1973). Defendants assert that the Trust Territory Government is not such an agency because (1) the Trust Territory is a foreign country and its government immune to suits in United States courts, or alternatively (2) that the Trust Territory Government is a government of a United States territory or possession within the meaning of 5 U.S.C. § 701(b)(1)(C) and excluded from judicial review.[17]

Under international law the Trust Territory occupies a unique position. By virtue of Article 3 of the Trusteeship Agreement the United States has "full powers of administration, legislation, and jurisdiction" over the territory, allowing in practical effect the exercise of full sovereign power although technically sovereignty resides elsewhere.[18] Beyond these full administrative powers normally granted to administering authorities in United Nations trusteeship

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[17] The APA, which provides for judicial review of "agency action," see 5 U.S.C. § 702, defines an agency as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." 5 U.S.C. § 701(b)(1). However, it is further provided that this definition does not include, inter alia, "the governments of the territories or possessions of the United States." 5 U.S.C. § 701(b)(1)(C).

[18] As noted by Francis D. Sayre, United States Representative in the Trusteeship Council and President of the Council, in his learned article on "Legal Problems Arising from the United Nations Trusteeship System," 42 Am.J.Int'l.L. 263, 271 (April, 1948):

> In the first place, there seems to be general concurrence with respect to the present trust territories, as there was with respect to the mandated territories, that wherever sovereignty does rest it is not in the administering power. This view has been re-enforced by statements of the United States, the United Kingdom and Australia as administering authorities of trust territories. Each of these has stated on separate occasions that it does not regard its administration of the trust territory as implying any claim of sovereignty.

agreements,[19] the Trust Territory is the only area designated as a "strategic" trust. Trusteeship Agreement, art. 1. This designation results in the United States being responsible to the Security Council for administration of the Trust Territory—where the United States possesses veto power [20]—rather than the General Assembly. It also permits preferential treatment of the United States in economic and commercial matters,[21] and allows this country unilaterally to declare all or any part of the islands a closed area within which the United States may determine the extent to which trustee functions shall be exercised and from which it may bar anyone, including the United Na-

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[19] After World War II, eleven trusteeships were set up pursuant to agreements between the United Nations and various nations. The United States' administration of the Trust Territory and Australia's administration of New Guinea are the only trusteeships still in effect.

[20] See Article 27 of the Charter of the United Nations.

[21] See Article 8(1) of the Trusteeship Agreement which provides:

> In discharging its obligations under Article 76(d) of the [United Nations] Charter . . . the administering authority . . . shall accord to nationals of each Member of the United Nations and to companies and associations organized in conformity with the laws of such Member, treatment in the trust territory no less favourable than that accorded therein to nationals, companies and associations of any other United Nation *except the administering authority.* (Emphasis added).

This article is the same as that contained in the draft trusteeship agreement submitted by the United States. The comment accompanying the United States proposal made it clear that the basis for preferential treatment of the United States was the "strategic" status of the Trust Territory. See Draft Trusteeship Agreement for the Japanese Mandated Islands, With Article by Article Explanatory Comments, (Department of State Publication, February 26, 1947) at 5-6, in 1 Whiteman, Digest of Int'l Law 810-811 (Released June, 1963).

tions.[22] See the dissent of Judge Lumbard in Callas v. United States, 253 F.2d 838, 842-844 (2d Cir. 1958).

Finally, in common with all trusteeship agreements negotiated with the United Nations, the Trusteeship Agreement may not be altered, amended or terminated without the consent of the United States. Trusteeship Agreement, art. 15.

The Congress authorized the President to vest the administrative power conferred on the United States by the Trusteeship Agreement "in such person or persons" to be exercised "in such manner and through such agency or agencies as the President . . . may direct or authorize." 48 U.S.C. § 1681(a) (Supp.1973). In Executive Order 11021, 3 C.F.R. 600 (1959-63 Compilation), 48 U.S.C. § 1681 (Supp.1973), the President delegated authority to the Secretary of the Interior as follows:

> Section 1. *Responsibility of Secretary of the Interior.* The responsibility for the administration of civil government in all of the trust territory, and all executive, legislative, and judicial authority necessary for that administration, are hereby vested in the Secretary of the Interior. . . . [T]he Secretary . . . shall take such actions as may be necessary and appropriate to carry out the obligations assumed by the United States as the administering authority of the trust territory under the terms of the trusteeship agreement and under the Charter of the United Nations. . . .

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[22] See Article 13 of the Trusteeship Agreement which provides:

> The provisions of Article 87 and 88 of the [United Nations] Charter [relating to reports, petitions, visits and questionnaires concerning non-strategic areas] shall be applicable to the trust territory, *provided that the administering authority may determine the extent of their applicability to any areas which may from time to time be specified by it as closed for security reasons.* (Emphasis added).

See also discussion in 1 Whiteman, *supra* at 824-830.

> Sec. [sic] 2. *Redelegation of authority.* The executive, legislative, and judicial authority provided for in section 1 of this order may be exercised through such officers or employees of the Department of the Interior, or through such other persons under the jurisdiction of the Secretary of the Interior, as the Secretary may designate, and shall be exercised in such manner as the Secretary, or any person or persons acting under the authority of the Secretary, may direct or authorize.

Pursuant to this authority, the Secretary issued a series of Secretarial Orders dealing with the civil administration of the Trust Territory which have been superseded and consolidated in Department of the Interior Order No. 2918 (December 27, 1968) (hereinafter "Order No. 2918"). This Order, as amended, creates a basically republican form of government in the Trust Territory with executive, legislative and judicial branches.

Executive authority is vested in the High Commissioner to "be exercised and discharged under the supervision and direction of the Secretary." Order No. 2918, pt. II § 1. The High Commissioner is appointed by the President of the United States with the advice and consent of the Senate. 48 U.S.C. § 1681(a) (Supp.1973). Thus his authority does not come from the people of the Trust Territory, nor do they have any method of removing him when dissatisfied with his actions or policies.

Legislative authority has been delegated to the Congress of Micronesia, consisting of a Senate and House of Representatives, whose members are elected by the citizens of the Trust Territory. Order No. 2918, pt. III §§ 1, 2, 5, 7 and 8. The power of the Congress is circumscribed, however, by the provision that it may not enact legislation inconsistent with the laws of the United States applicable to the Trust Territory, treaties or international agreements of the United States, Executive Orders of the President or orders

of the Secretary of the Interior. *Id.* § 2. Moreover, every bill passed by the Congress is subject to veto by the High Commissioner. His veto may be overridden by a two thirds majority of the entire membership of both Houses, but the re-enacted bill is still subject to veto by the Secretary of the Interior. The Secretary's action is final and may not be overridden. *Id.* § 13.

Judicial authority is vested in High Court which is independent of the executive and legislative powers. Order No. 2918, pt. IV. The Secretary appoints the Chief Justice and all Associate Justices free from any control by the Congress of Micronesia.

In addition, Order No. 2918 specifies that the relations of the Trust Territory Government with the Congress of the United States on all legislative matters, including appropriations, shall be conducted through the Department of the Interior. Pt. II § 2. Likewise, contact with other Federal agencies and communications with foreign governments and international bodies must go through and be cleared by the Department. Pt. II §§ 4 and 5.

Upon consideration of all of the above, it is my opinion that the United States exercises a maximum degree of control which is inconsistent with the assertion that the Trust Territory is a foreign country. My decision is reinforced by the fact that there does not appear to have been any significant delegation of authority to the citizens of the Trust Territory.[23] The United States, acting through the Secretary of the Interior, controls the High Commissioner and retains an absolute veto over all legislation enacted by

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[23] The court is informed that this situation will probably change as a result of the Micronesian Future Political Status Talks now under way between Ambassador Franklin Williams of the United States and representatives of the Congress of Micronesia. See Official Record of the Fourth Round of Micronesian Future Political Status Talks (Released by the Office of Micronesian Status Negotiations, Washington, D. C. 1972). However, at the time of the filing of this action, Order No. 2918 was still in full effect.

the Congress of Micronesia. Accordingly, without determining exactly what status the Trust Territory occupies, I hold that it is not a foreign country entitled to immunity from suits in United States courts.

The cases cited by defendants for the proposition that the Trust Territory is a foreign country are not to the contrary. Brunell v. United States, 77 F.Supp. 68 (S.D.N.Y. 1948) and Callas v. United States, 253 F.2d 838 (2d Cir. 1958) turn on a construction of the term "foreign country" as used in the Tort Claims Act. See 28 U.S.C. § 2680(k). Similarly, Application of Reyes, 140 F.Supp. 130 (D. Hawaii 1956) and Aradanas v. Hogan, 155 F.Supp. 546 (D. Hawaii 1957) construe the term "foreign state" as used in the Immigration and Nationality Act. See 8 U.S.C. § 1101 (a)(14). None of these cases go outside the scope of the particular act under consideration [24] and the legal status of the Trust Territory Government was never an issue.

While avoiding the Trust Territory Government's claim of sovereign immunity as the government of a foreign country, plaintiffs cannot also avoid the APA's exclusion of "the governments of the territories or possessions of the United States" from judicial review. 5 U.S.C. § 701 (b)(1)(C). Admittedly, the Trust Territory is technically not a territory or possession because the United States does not have sovereignty. This distinction is immaterial, however, because the legislative history of the APA makes it clear that Congress intended to exclude from judicial review *all* governments created pursuant to the authority of Congress.

Senator McCarran, Chairman of the Senate Judiciary Committee, made these remarks in reporting on the Sen-

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[24] See Brunell v. United States, *supra* 77 F.Supp. at 69, 72; Callas v. United States, *supra* 253 F.2d at 840; Application of Reyes, *supra* 140 F.Supp. at 131-132; Aradanas v. Hogan, *supra* 155 F.Supp. at 547.

ate Bill that, with only minor clarifications and corrections, was enacted as the APA:

> As it has been reported to the Senate, the committee feels that it has avoided the mistake of attempting to over-simplify this measure. It has not hesitated, therefore, to state functional classifications and exceptions where those could be rested upon firm grounds. In so doing, *the committee has followed the undeviating policy of dealing with types of functions as such and in no case dealing with administrative agencies by name.* That point is important, and I will repeat it if I may. The committee has not deviated from the policy of dealing with types of functions as such, and the bill in no case deals with administrative agencies by name. (Emphasis added). 92 Cong.Rec. 2150 (1946).

This theme is reiterated in the House Judiciary Committee Report:

> Functional classifications and exemptions have been made, but in no part of the bill is any agency exempted by name. *The bill is meant to be operative 'across the board' in accordance with its terms, or not at all. Where one agency has been able to demonstrate that it should be exempted, all like agencies have been exempted in general terms.* (See sec. 2(a)). Where one agency has shown that some particular operation should be exempted from any particular requirement, the same function in all agencies has been exempted. No agency has been favored by special treatment. (Emphasis added). H.Rep.No.1980, in 1946 U.S. Code Cong. & Ad.News 1195, 1205.

In view of this clearly expressed congressional intent to operate "across the board" and exempt "all like agencies . . . in general terms," this court concludes that the Trust Territory Government is excluded from review under sec-

tions 701 to 706 of the APA. The fact that the United States is technically without sovereignty in the Trust Territory is, under the circumstances, a distinction without a difference.

This conclusion is supported by reference to United States administration of American Samoa. Its government is virtually identical to that of the Trust Territory insofar as the power of the Secretary of the Interior or the important Samoan governmental bodies are concerned.[25] Judge Tavares of this district held that the APA exclusion is applicable to the civil government in Samoa. General Constructors Company of Nevada v. Morton, Civ. No. 71-3409 (D. Hawaii decided September 16, 1971) (Unpublished Opinion). Thus under the rule that all like agencies should be exempted from the operation of the APA, the Trust Territory Government should likewise be excluded.[26]

Plaintiffs argue that a distinction must be drawn between the High Commissioner and the other branches of the Trust Territory Government, and that in order to prevail they need only establish that the High Commissioner is a "federal agent." See Plaintiffs' Memorandum in Response to Defendants' Motions to Dismiss at 3-18. While I accept plaintiffs' argument that under general principles of agency law and court decisions defining the term "federal

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[25] Compare 48 U.S.C. § 1661(c) (Supp. 1973) with 48 U.S.C. § 1681(a) (Supp. 1973); Executive Order No. 10264, 16 F.R. 6419, with Executive Order No. 11021, 3 C.F.R. 1959; Department of the Interior Order No. 2657, as amended, with Department of the Interior Order 2918, as amended.

[26] See Harris v. Boreham, 233 F.2d 110 (3rd Cir. 1956), where it was held that the government of the Virgin Islands, including two municipalities into which it was divided, was not a "federal agency" within the meaning of the Tort Claims Act, nor was the Superintendent of Public Works of one of these divisions an officer or employee of a federal agency while he was supervising the maintenance of streets even though his salary was paid from federal funds, and he was appointed by the Secretary of the Interior.

agency",[27] the High Commissioner and his immediate subordinates in the executive branch of the Trust Territory Government are federal officials operating as a component of the Department of the Interior, it does not alter my conclusion that the APA exclusion is applicable in this case. To exempt federal officials serving as officers of the governments of the territories and possessions from United States laws governing federal agency action was obviously the reason for the exclusion. Whether the Trust Territory Government is considered as a whole, or the High Commissioner by himself, the result is the same.[28]

Having concluded that the Trust Territory Government is exempt from judicial review under the APA it follows that it is also immune under the provisions of NEPA. No reason is apparent—and plaintiffs cite none—why the same rules on the scope of review should not be applied. Accordingly, the action of High Commissioner Johnston approving and executing the lease agreement is not "federal" action within the meaning of NEPA.

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[27] See, e.g., Domenech v. National City Bank, 294 U.S. 199, 55 S.Ct. 366, 79 L.Ed. 857 (1935); Standard Oil Co. of California v. Johnson, 316 U.S. 481, 62 S.Ct. 1168, 86 L.Ed. 1611 (1942); Korman v. Federal Housing Administrator, 72 App. D.C. 245, 113 F.2d 743 (1940); Lassiter v. Guy F. Atkinson Co., 176 F.2d 984 (9th Cir. 1949).

[28] On the basis of affidavits submitted by the parties and testimony at the hearing on the Motion for a Temporary Restraining Order and again at the hearing on the Motions to Dismiss, it is clear that plaintiffs' allegations that the decision to approve the lease agreement was made or dictated by officials in the Department of the Interior are without foundation. The lease approval was a "local" decision of the High Commissioner acting within the scope of his duties as chief executive of the Trust Territory Government. The officials of the Interior Department did not negotiate, counsel, advise or participate in the decision. Nor was the lease ever sent to the Department for approval or concurrence in any form. Because unwarranted inferences of fact may not preclude dismissal, see 2A Moore's Federal Practice § 12.08, this allegation has not been admitted for the purposes of these motions.

APPROVAL OF THE LEASE AGREEMENT IS MAJOR ACTION WITHIN THE MEANING OF NEPA

Though their argument is not entirely clear, it appears that defendants assert not only that the High Commissioner's approval of the lease agreement is not federal agency action but that it is not "major" action within the meaning of NEPA.

This contention has been settled adversely to defendants by Davis v. Morton, 469 F.2d 593 (10th Cir. decided November 24, 1972). The issue in that case was whether approval by the Secretary of the Interior of a 99-year lease of Indian lands executed by an Indian tribe and a development company constituted major federal action. The United States did not initiate the lease, was not a party, possessed no interest in either the lease or the development, and did not participate financially or benefit from the lease in any way. Nonetheless, the Court held that "approving leases on federal lands constitutes major federal action and thus must be approved according to NEPA mandates." 4 E.R.C. at 1738. See also, Greene County Planning Board v. Federal Power Commission, 455 F.2d 412 (2d Cir. 1972) (License to construct a high voltage power line conceded by all parties to be a major action); Izaak Walton League of America v. Schlesinger, 337 F. Supp. 287 (D.D.C.1971) (Issuance of an interim operating license for a nuclear power plant held to be major action); City of New York v. United States, 337 F.Supp. 150 (E.D. N.Y.1972) (Interstate Commerce Commission order authorizing abandonment of a railroad line held to be major action).

Thus it is clear that the approval and execution of the lease of public lands in the instant case is "major" action within the meaning of NEPA.

TRUST TERRITORY GOVERNMENT DOES NOT HAVE SOVEREIGN IMMUNITY WHEN SUED FOR VIOLATIONS OF AN ACT OF CONGRESS

Defendants claim that action against High Commissioner Johnston is actually directed against the Trust Territory

and is therefore barred by sovereign immunity.[29] To the extent that this claim is based on their previous argument that the Trust Territory is a foreign country, it has already been rejected. However, defendants also argue that the Trust Territory possesses attributes of sovereignty equivalent to a state government, relying principally on Kawananakoa v. Polybank, 205 U.S. 349, 27 S.Ct. 526, 51 L.Ed. 834 (1907).

It appears to be clear that there are degrees or attributes of sovereignty, and that a government may be entitled to and enjoy some of these attributes without necessarily having all of them.

In the *Kawananakoa* case, Justice Holmes held that the Territory of Hawaii was immune from suit without its consent on the following basis:

> A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that *there can be no legal right as against the authority that makes the law on which the right depends....*
>
> As the ground is thus logical and practical, the doctrine is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended to those that, in actual administration, originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights. A suit presupposes that the defendants are subject to the law invoked. Of course it cannot be maintained unless they are so. But that is not the case with a territory of the United States, because the territory itself is the fountain from which rights ordinarily flow. It is true that Congress might

[29] Of course, sovereign immunity would be no defense if the Trust Territory Government had been construed to be a federal agency subject to judicial review under NEPA and the APA. See Kalur v. Resor, 335 F.Supp. 1, 8-9 (D.D.C.1971).

> intervene, just as in the case of a state the Constitution does, and the power that can alter the Constitution might. But the rights that exist are not created by Congress or the Constitution, except to the extent of certain limitations of power. 205 U.S. at 353-354, 27 S.Ct. at 527. (Emphasis added).

In the instant case, the same principles apply.

As previously discussed, the Trusteeship Agreement gives the United States full powers of legislation in the Trust Territory. With respect to local matters, this power has been delegated to the Congress of Micronesia along the lines followed in organizing the territories and possessions of the United States. On the basis of the principles outlined in *Kawananakoa,* I believe that this delegation of local legislative power gave the Trust Territory what has been referred to as "quasi-sovereignty" or "qualified sovereignty," carrying with it the attribute of immunity from suit without its own consent. See Porto Rico v. Rosaly y Castillo, 227 U.S. 270, 33 S.Ct. 352, 57 L.Ed. 507 (1913); People of Puerto Rico v. Shell Co., 302 U.S. 253, 58 S.Ct. 167, 82 L.Ed. 235 (1952); Harris v. Boreham, 233 F.2d 110 (3rd Cir. 1956); Harris v. Municipality of St. Thomas and St. John, 212 F.2d 323 (3rd Cir. 1954).

This immunity, however, cannot be extended to include suits under a statute of the United States applicable in the Trust Territory. Such statutes confer rights which are not dependent on local authority—indeed, they supersede local law [30]—and thus are not within the rule set out in *Kawananakoa.* Near the end of the opinion Justice Holmes

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[30] Order No. 2918, pt. III § 2(b) provides:

> *Legislative Power.* The legislative power of the Congress of Micronesia shall extend to all rightful subjects of legislation, except that no legislation may be inconsistent with
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> • • • • • • • • • • •
>
> (b) laws of the United States applicable to the Trust Territory. . . .

specifically notes that "the rights [under consideration] . . . are not created by Congress or the Constitution, except to the extent of certain limitations of power. 205 U.S. at 354-355, 27 S.Ct. at 527.

In my opinion, then, the delegation of legislative power to the Congress of Micronesia which created a qualified sovereignty in the Trust Territory as respects its own laws did not create any immunity from suits under an act of Congress such as NEPA. If there is immunity, it must be found elsewhere.

THE TRUSTEESHIP AGREEMENT DOES NOT VEST PLAINTIFFS WITH INDIVIDUAL LEGAL RIGHTS WHICH MAY BE ASSERTED IN THIS COURT

Plaintiffs allege that under the Trusteeship Agreement, particularly Article 6(2) which states that the administering authority shall "protect the inhabitants against the loss of their lands and resources," the United States undertook a "sacred trust"[31] which requires compliance with NEPA in all major actions affecting the environment. In support of their position, they cite Pyramid Lake Paiute Tribe v. Morton, 354 F.Supp. 252 (D.D.C. decided November 9, 1972) and Davis v. Morton, 469 F.2d 593 (10th Cir. decided November 24, 1972) which held that exacting fiduciary standards governed the Secretary of the Interior's actions that affected respectively water and land rights of American Indian tribes.

While the analogy to American Indians may be apt in some respects, I do not believe that the principles of *Pyra-*

[31] Article 73 of the Charter of the United Nations states that:

> Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the *interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost* . . . the well-being of the inhabitants of these territories. . . ." (Emphasis added).

mid Lake Paiute Tribe and *Davis* can be relied upon in this case. The "trust responsibility" of the United States as administering authority of the Trust Territory arises out of the Trusteeship Agreement. As discussed above, this document designates the islands as a "strategic" area and thus accords the United States unique and virtually unfettered rights of administration. Under these circumstances, it appears to be entirely inappropriate to apply the usual rules of interpretation for trust agreements and fiduciary obligations.

I conclude with Judge Keech in Pauling v. McElroy, 164 F.Supp. 390, 393 (D.D.C.1958) that:

> The provisions of the . . . Trusteeship Agreement for the Trust Territory of the Pacific Islands . . . are not self-executing and do not vest any of the plaintiffs with individual legal rights which they may assert in this Court. The claimed violations of such international obligations and principles may be asserted only by diplomatic negotiations between the sovereignties concerned.

Other Allegations

Finally, the pro forma allegations that the Complaint does not "contain a short and plain statement of the claim" as required by Rule 8(a)(2) of the Federal Rules of Civil Procedure, and that plaintiffs have been guilty of laches, are without merit.

Therefore, based on my conclusion that neither the APA nor NEPA provide for judicial review of the actions complained of and that the Trusteeship Agreement does not vest plaintiffs with legal rights enforceable in this court, the Motions to Dismiss are granted.

It is so ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-1769

THE PEOPLE OF SAIPAN, by and through HERMAN Q. GUERRERO, LINO M. OLOPAI, DAVID T. ALDAN, JESUS A. SASAMOTO, JUSTIN S. MANGLONA, NICK SANTOS, BEN A. GUERRERO, JOHN ROSARIO, RICH R. MARCIANO, JOAQUIN P. VILLAGOMEZ, *Plaintiffs and Appellants,*

v.

UNITED STATES DEPARTMENT OF INTERIOR, ROGERS C. B. MORTON, Secretary of Interior, STANLEY S. CARPENTER, Deputy Assistant Secretary of the Interior for Territorial Affairs, EDWARD E. JOHNSTON, High Commissioner of the Trust Territory of the Pacific Islands, all individually and in their official capacities.
Governmental Defendants and Appellees.
and
CONTINENTAL AIRLINES, INC., a Nevada Corporation,
Corporate Defendant and Appellee.

[July 16, 1974]

Appeal from the United States District Court
for the District of Hawaii.

Before: TRASK and GOODWIN, Circuit Judges, and EAST,*
District Judge.

GOODWIN, Circuit Judge:

Plaintiffs, citizens of the Trust Territory of the Pacific Islands (known also as Micronesia), sued in the district court to challenge the execution by the High Commissioner of the Trust Territory of a lease permitting Continental

* The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

Airlines to construct and operate a hotel on public land adjacent to Micro Beach, Saipan. Plaintiffs appeal a judgment of dismissal.

The district court held that the Trust Territory government is not a federal agency subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, or the National Environmental Policy Act (NEPA) 42 U.S.C. §§ 4321 et seq., and that the Trusteeship Agreement does not vest plaintiffs with individual legal rights which they can assert in a federal court. The court's opinion is published at 356 F.Supp. 645 (D. Hawaii 1973). We affirm the judgment, but, for the reasons set out below, we do so without prejudice to the right of the plaintiffs to refile in the district court should the High Court of the Trust Territory deny that it has jurisdiction to review the legality of the actions of the High Commissioner.

The facts are set out in detail in the district court opinion. In brief, Continental applied in 1970 to the Trust Territory government for permission to build a hotel on public land adjacent to Micro Beach, Saipan, an important historical, cultural, and recreational site for the people of the islands. Pursuant to the requirements of the Trust Territory Code, 67 T.T.C. § 53, Continental's application was submitted to the Mariana Islands District Land Advisory Board for its consideration. In spite of the Board's unanimous recommendation that the area be reserved for public park purposes, the District Administrator of the Marianas District recommended approval of a lease. The High Commissioner himself executed the lease on behalf of the Trust Territory government. An officer appointed by the President of the United States with the advice and consent of the Senate (48 U.S.C. § 1681a), the High Commissioner is the highest official in the executive branch of the Trust Territory government.

Following its execution in 1972, the lease was opposed by virtually every official body elected by the people of

Saipan. Indeed, the record in this case shows that the High Commissioner's decision was officially supported only by the United States Department of the Interior, the Trust Territory Attorney General (a United States citizen), and the District Administrator of the Marianas District (appointed by the High Commissioner, serving directly under him, and subject to removal by him).

Later in 1972, an action against some of the parties here was commenced before the High Court of the Trust Territory to enjoin construction of the hotel. The High Court, while denying defendants' motions to dismiss on certain nonfederal causes of action, held that NEPA did not apply to actions of the Trust Territory government, as plaintiffs had contended.[1] Soon afterward, the plaintiffs filed this action in the United States District Court for the District of Hawaii, and the High Court thereupon stayed proceedings before it pending the outcome of this action.

I. Judicial Review Under the APA or NEPA

The district court, relying upon its earlier decision in *People of Enewetak* v. *Laird*, 353 F.Supp. 811 (D. Hawaii 1973), again held that NEPA applies to federal agencies operating in the Trust Territory. It also held that approval of the lease agreement was "major" action, within the meaning of NEPA. However, although the district court rejected the defendants' contention that the Trust Territory government is a foreign government immune to suits

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[1] The High Court concluded that the Trust Territory government was not a "federal agency" and that the High Commissioner, acting as its chief executive officer, was not subject to NEPA. The court relied primarily upon the prior determination of the Secretary of the Interior that "territorial governments, under the jurisdiction of the Secretary of the Interior, are not agencies or instrumentalities of the executive branch of the Federal Government • • • [and] that the territorial governments are not organized entities of the Department of the Interior." Dept. Manual of Dept. of Interior 150.1.4.

in United States courts, it accepted the defendants' alternate contention that the local government is a government of a United States territory or possession, within the meaning of the exclusionary clause in the Administrative Procedure Act, 5 U.S.C. § 701(b)(1)(C).[2] Having concluded that the Trust Territory government was exempt from review under the APA, the district court reasoned that the same standards on the scope of review should be applied to NEPA, and concluded that the action of the High Commissioner in approving and executing the lease agreement was not "federal" action covered by the National Environmental Policy Act, 42 U.S.C. § 4332.[3]

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[2] For the purpose of this chapter—

"(1) 'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

"* * *

"(C) the governments of the territories or possessions of the United States * * *." 5 U.S.C. § 701(b).

[3] "The Congress authorizes and directs that, to the fullest extent possible: * * * all agencies of the Federal Government shall—

"* * *

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented * * *." 42 U.S.C. § 4332.

We affirm these conclusions of the district court. *See* 356 F.Supp. at 649-61.[4]

We recognize, as did the district court, that several decisions have held governments of United States territories to be agencies of the federal government. However, these cases all involved a determination of agency for such purposes as income taxation, *Bell* v. *Commissioner,* 278 F.2d 100 (4th Cir. 1960), or the applicability of the Portal-to-Portal Act of 1947, *Kam Koon Wan* v. *E. E. Black, Ltd.,* 188 F.2d 558 (9th Cir.), *cert. denied,* 342 U.S. 826 (1951).[5] Plaintiffs have not cited and we have not found a case applying APA judicial review provisions to the Trust Territory or applying even similar review standards to the civil government of any territory or possession.

We also recognize, again as did the district court, that the APA exclusionary clause excludes only "the governments of the territories or possessions of the United States," 5 U.S.C. § 701(b)(1)(C), and that the Trust Territory is not a territory or possession, because technically the United States is a trustee rather than a sovereign. We agree with the district court that this distinction is immaterial, however, because the intent of Congress was to exclude from APA review all governments of this general type created pursuant to the authority of Congress.

Plaintiffs have cited several judicial decisions, a regulation, and one Tax Court decision stating that the Trust Territory is not a territory or possession of the United States. However, the holding of the judicial decisions is

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[4] *See also Vermilya-Brown Co.* v. *Connell,* 335 U.S. 377 (1948), in support of the conclusion that NEPA applies to federal agencies operating in the Trust Territory.

[5] *But see Porter* v. *United States,* 496 F.2d 583 (Ct.Cl. May 15, 1974), holding that the Trust Territory government was not an agency of the United States for the purpose of asserting jurisdiction against the United States for an alleged breach of a contract negotiated by officials of the Trust Territory government.

limited to the applicability of the Federal Tort Claims Act (*see, e.g., Callas* v. *United States*, 253 F.2d 838 (2d Cir.), *cert. denied*, 357 U.S. 936 (1958); *Brunell* v. *United States*, 77 F.Supp. 68 (S.D.N.Y. 1948)), and the regulation and the Tax Court decision both involve federal income taxation. *See* Treas. Reg. § 1.931-1(a)(1); *Richard W. Benfer*, 45 T.C. 277 (1965). We do not read these decisions and the regulation to be inconsistent with our conclusion that Congress intended the government of the Trust Territory, like that of territories and possessions, to be immune from judicial review under the APA.

Finally, we note that the Trusteeship Agreement, in which the United Nations designated the United States to be the administering authority of the Trust Territory, states that the United States shall "promote the development of the inhabitants of the trust territory toward self-government * * *." Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, art. 6(1), 61 Stat. 3301, 3302, T.I.A.S. No. 1665. This clear statement of intent on the part of the United Nations to foster self-government in the Trust Territory constrains us not to hold that the actions of the local government are reviewable in the same manner as the actions of domestic federal administrative agencies, in a federal district court several thousand miles from the islands.

For these reasons and for those expressed in the opinion of the district court, we affirm the conclusion of that court that neither the Trust Territory government nor the High Commissioner alone is a "federal agency" as that term is used in making actions reviewable under the APA or NEPA.

II. Trusteeship Agreement

Plaintiffs also asserted below and assert here that the action of the governmental defendants in leasing public land to an American corporation against the expressed opposition of the elected representatives of the people of

Saipan and without compliance with NEPA is a violation of their duties under the Trusteeship Agreement. The district court rejected this argument, holding that the Trusteeship Agreement did not vest the citizens of the Trust Territory with rights which they can assert in a district court.

We cannot accept the full implications of this holding. We do not dispute the district court's conclusion that compliance with NEPA was not required by the Trusteeship Agreement.[6] We do, however, disagree with the holding insofar as it can be read to say that the Trusteeship Agreement does not create for the islanders substantive rights that are judicially enforceable.

The district court relied for its conclusion on language in *Pauling* v. *McElroy*, 164 F.Supp. 390, 393 (D.D.C. 1958), *aff'd on other grounds*, 278 F.2d 252 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960). *Pauling* concerned an attempt to enjoin United States officials from proceeding with nuclear tests in the Marshall Islands, an area within the trusteeship. The controversy there, unlike the one here, involved the Trusteeship Agreement's grant of broad discretion to use the area for military purposes. *See* Trusteeship Agreement arts. 1, 5, 13, 61 Stat. 3301, 3302, 3304. We do not find *Pauling* to support the defendants' contention here that the plaintiffs cannot invoke the provisions of the Trusteeship Agreement to challenge the High Commissioner's power to lease local public land for commercial exploitation by private developers.

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[6] Article 12 of the Trusteeship Agreement empowers the United States "to enact such legislation as may be necessary to place the provisions of this agreement in effect in the trust territory." Our conclusion that the actions of the Trust Territory government are not subject to NEPA is an equivalent way of saying that Congress has not, pursuant to Article 12, legislated to make NEPA applicable to the Trust Territory government. Hence, in approving the lease agreement, the High Commissioner was under no obligation to comply with NEPA. This is the same conclusion as that reached by the High Court. *See* note 1, *supra*.

The right of Rhodesian and American citizens to maintain an action in the courts of the United States seeking enforcement of the United Nations embargo against Rhodesia was recently recognized in *Diggs* v. *Schultz*, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973). On the merits, the court denied specific relief because of Congressional action which was held to have abrogated the United Nations Security Council Resolution, but the right to seek enforcement in federal court was firmly established. That decision, if correct, suggests that the islanders here can enforce their treaty rights, if need be in federal court.[7]

Article 73 of the United Nations Charter, 59 Stat. 1031, 1048, T.S. No. 993 (1945), which discusses non-self-governing territories generally, provides:

> "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:
>
> "a. To ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protections against abuses * * *."

See also United Nations Charter art. 76, describing the basic objectives of the trusteeship system. Although the plaintiffs have argued that these articles of the United Nations Charter, standing alone, create affirmative and

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[7] *See* Note, 14 Va. J. Int'l L. 185 (1973), which comments upon *Diggs* v. *Schultz*.

judicially enforceable obligations, we assume without deciding that they do not.

However, pursuant to Article 79 of the Charter,[8] the general principles governing the administration of trust territories were covered in more detail in a specific trusteeship agreement for the Trust Territory of the Pacific Islands. *See generally* L. Goodrich, E. Hambro & A. Simons, *Charter of the United Nations: Commentary & Documents* 502 (3rd ed. 1969). Specifically, Article 6 of the Trusteeship Agreement requires the United States to "promote the economic advancement and self-sufficiency of the inhabitants, and to this end * * * regulate the use of natural resources" and to "protect the inhabitants against the loss of their lands and resources * * *."

Defendants contend, though, that provisions of the Trusteeship Agreement, including Article 6, can be enforced only before the Security Council of the United Nations.[9] We disagree, concluding that the Trusteeship Agreement can be a source of rights enforceable by an individual litigant in a domestic court of law.

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[8] The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held under mandate by a Member of the United Nations, and shall be approved as provided for in Articles 83 and 85." *United Nations Charter* art. 79, 59 Stat. 1031, 1049.

[9] Unlike the other ten trusteeships set up after World War II, pursuant to agreements between the United Nations and various nations, the Trust Territory was designated as a "strategic" trust. Trusteeship Agreement art. 1, 61 Stat. 3301. *See* 1 M. Whiteman, *Digest of International Law* 766. This designation results in the United States being responsible to the Security Council for the administration of the Trust Territory—where the United States possesses veto power (*United Nations Charter* art. 27, 59 Stat. 1041)—rather than to the General Assembly. *United Nations Charter* art. 83(1), 59 Stat. 1050.

The extent to which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation must be determined in each case by reference to many contextual factors: the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution. *See generally* M. McDougal, H. Lasswell, & J. Miller, *The Interpretation of Agreements and World Public Order; Principles of Content and Procedure passim* (1967).

The preponderance of features in this Trusteeship Agreement suggests the intention to establish direct, affirmative, and judicially enforceable rights. The issue involves the local economy and environment, not security; the concern with natural resources and the concern with political development are explicit in the agreement and are general international concerns as well; the enforcement of these rights requires little legal or administrative innovation in the domestic fora; and the alternative forum, the Security Council, would present to the plaintiffs obstacles so great as to make their rights virtually unenforceable.

Moreover, the Trusteeship Agreement constitutes the plaintiffs' basic constitutional document (*see* Parry, *The Legal Nature of Trusteeship Agreements*, 27 Brit. Year Book Int'l L. 164, 182-84 (1950), *excerpted* in 1 M. Whiteman, *Digest of International Law* 893 (1963), and is codified into the law of the Trust Territory. 1 T.T.C. § 101(1). For all these reasons, we believe that the rights asserted by the plaintiffs are judicially enforceable. However, we see no reason why they could not and should not have been enforced in the High Court of the Trust Territory. The district court found that:

> "* * * The lease approval was a 'local' decision of the High Commissioner acting within the scope of his duties as chief executive of the Trust Territory gov-

> ernment. The officials of the Interior Department did not negotiate, counsel, advise or participate in the decision. Nor was the lease ever sent to the Department for approval or concurrence in any form * * *." 356 F. Supp. at 657 n.28.

Surely, the judicial branch of the Trust Territory government has the authority to determine whether or not the action of its chief executive complies with a provision in its own constitutional document.

We recognize that the Trusteeship Agreement purports to obligate the United States, not the individual who happens to be High Commissioner. Nonetheless, because of the process of his appointment,[10] the High Commissioner

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[10] Article 12 of the Trusteeship Agreement of 1947 authorized the United States to enact such legislation as may be necessary to implement the agreement. 61 Stat. 3304. At first, President Truman gave the Navy administrative responsibility for the islands. Exec. Order No. 9875, 12 Fed. Reg. 4837 (1947), 3 C.F.R. 658 (1943-48 Comp.). In 1951 administration of the islands was transferred to the Department of the Interior. Exec. Order No. 10265, 16 Fed. Reg. 6419 (1951), 3 C.F.R. 766 (1943-53 Comp.). During the next two years, responsibility for administration of parts of the Trust Territory was redelegated back to the Secretary of the Navy. Exec. Order No. 10408, 17 Fed. Reg. 10277 (1952), 3 C.F.R. 906 (1949-53 Comp.); Exec. Order No. 10470, 18 Fed. Reg. 4231 (1953), 3 C.F.R. 951 (1949-53 Comp.). Not until 1954 did Congress begin to legislate to implement the Trusteeship Agreement, and then it merely stated that, until it provided further for its government, all governmental authority in the Trust Territory rested with the President. Act of June 30, 1954, ch. 423, § 1, 68 Stat. 330, *as amended*, 48 U.S.C. § 1681(a). Finally, in 1962 President Kennedy redelegated his authority for civil administration of the entire Trust Territory to the Secretary of the Interior. Exec. Order No. 11021, 27 Fed. Reg. 4409 (1962), 3 C.F.R. 600 (1959-63 Comp.). The Secretary of the Interior, in turn, delegated executive authority for the Trust Territory to the High Commissioner:

> "The executive authority of the Government of the Trust Territory, and the responsibility for carrying out the international obligations undertaken by the United Nations with re-

has the responsibility to act in a manner consistent with the duties assumed by the United States itself in the Trusteeship Agreement.

Thus, although we hold that the Trusteeship Agreement is a source of individual legal rights, we also hold that, in a case involving actions by the High Commissioner within the scope of his duties as chief executive, these rights are not initially enforceable in United States courts. Rather, upon principles of comity, they should be asserted before the High Court of the Trust Territory.

Admittedly, the substantive rights guaranteed through the Trusteeship Agreement are not precisely defined. However, we do not believe that the agreement is too vague for judicial enforcement. Its language is no more general than such terms as "due process of law," "seaworthiness," "equal protection of the law," "good faith," or "restraint of trade," which courts interpret every day. Moreover, the High Court can look for guidance to its own recently

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spect to the Trust Territory, shall be vested in a High Commissioner of the Trust Territory and shall be exercised and discharged under the supervision and direction of the Secretary." Dept. of Interior Order No. 2918, pt. II, § 1, 34 Fed. Reg. 157 (1969).

Meanwhile, the 1967 Congress provided that this High Commissioner shall be appointed by the President and confirmed by the Senate. Act of May 10, 1967, Pub. L. No. 90-16 § 2, 81 Stat. 15, *codified*, 48 U.S.C. § 1681a. *See generally* Note, *A Macrostudy of Micronesia: The Ending of a Trusteeship*, 18 N.Y.L.F. 139 (1972).

Thus, as the district court here observed, the High Commissioner's authority "does not come from the people of the Trust Territory, nor do they have any method of removing him when dissatisfied with his actions or policies." 356 F. Supp. at 655. *See also Societa A.B.C.* v. *Fontana & Della Rocca*, [1955] I.L.R. 76 (Court of Cassation, United Chambers, Italy 1954), quoted at 1 M. Whiteman, *Digest of International Law* 870-71, which held that the Italian Trusteeship Administrator for Somaliland derived his authority from the Italian state and, hence, was an organ of that state.

enacted environmental quality and protection act, T. T. Pub. L. No. 4C-78 of Apr. 14, 1972, *codified* at 63 T.T.C. §§ 501-509, to the relevant principles of international law and resource use which have achieved a substantial degree of codification and consensus (*see Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 428 (1964)), and to the general direction, although not necessarily the specific provisions, of NEPA. *Cf. Pyramid Lake Paiute Tribe of Indians* v. *Morton*, 354 F. Supp. 252 (D.D.C. 1972). These sources should provide a sufficiently definite standard against which to test the High Commissioner's approval of a 50-year lease of unique public lands to an American corporation, allegedly in disregard of the protests of the islands' elected officials and without a showing of consideration of cultural and environmental factors.

Since the High Commissioner claims to have been acting pursuant to local statutes when he approved the lease to Continental, if the High Court finds that his action violated provisions of the Trusteeship Agreement, that court may have to declare these statutes void either on their face or void as applied by the High Commissioner. The order of the United States Department of the Interior which established the structure of the Trust Territory government forbids the legislative branch of the Trust Territory government from enacting any legislation inconsistent with "treaties or international agreements of the United States • • •." Dept. of Interior Order No. 2918, pt. III, § 2(a) (1968). Because the Trusteeship Agreement is an international agreement of the United States, local legislation inconsistent with it must fall.

Although the High Court has held that it lacks jurisdiction over an agency of the United States or its officers in the Trust Territory (*see Schulz* v. *Peace Corps*, 4 T.T.R. 428 (1969)), the Secretary of the Interior assures us that his department did not participate in any way in the decision to grant a lease to Continental, and, hence, that *Schulz* will not bar the High Court from hearing and deciding this

case. If, in the proceedings before the High Court, it should appear that the actions of the High Commissioner cannot be effectively reviewed and tested against the duties assumed by the United States in the Trusteeship Agreement, either because his actions were controlled by a directive or regulation of the Secretary of the Interior which the High Court considers nonreviewable or because the High Court does not agree that it has the power to review the High Commissioner's actions against the standards established in the Trusteeship Agreement, then the plaintiffs may refile this action in the United States District Court for the District of Hawaii.

We recognize that the High Court has said earlier that the Trusteeship Agreement does not create a trust capable of enforcement through the courts. *See Alig* v. *Trust Territory of the Pacific Islands*, 3 T.T.R. 603, 615-16 (1967). We also recognize that, unless the High Commissioner acted unconstitutionally or in violation of the law, the suit against him might not be cognizable in the Trial Division of the High Court because of the doctrine of sovereign immunity. *See also* 6 T.T.C. § 252(2). Nonetheless, the High Court is free to re-evaluate its position with regard to the enforceability of the provisions of the Trusteeship Agreement under *Diggs* v. *Schultz, supra.*[11] It may con-

[11] "Appellees suggest that the prospects of significant relief by means of the embargo are so slight that this relationship of intended benefit is too tenuous to support standing. But this strikes us as tantamount to saying that because the performance of the United Nations is not always equal to its promise, the commitments of a member may be disregarded without having to respond in court to a charge of treaty violation. It may be that the particular economic sanctions invoked against Southern Rhodesia in this instance will fall far short of their goal, and that appellants will ultimately reap no benefits from them. But, to persons situated as are appellants, the United Nations action constitutes the only hope; and they are personally aggrieved and injured by the dereliction of any member state which weakens the capacity of the world organization to make its policies meaningful." *Diggs* v. *Schultz*, 470 F.2d at 465.

clude, as we did, that as the judicial branch of a political entity possessing many of the attributes of an independent nation, that court has the power to hear a claim that the islands' chief executive officer has violated terms of the Trusteeship Agreement. If the High Court reaches this conclusion, the doctrine of sovereign immunity would provide no basis for refusing to hear the action. *See Malone* v. *Bowdoin*, 369 U.S. 643, 647 (1962); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-90, 701-02 (1949).

We hold, then, that the plaintiffs must initially pursue their remedies in the local court. If our assumption that the High Court has the power to review the decision of the High Commissioner proves to be invalid, then the federal district court must assume jurisdiction of this case. We refuse to leave the plaintiffs without a forum which can hear their claim that the High Commissioner has violated the duties assumed by the United States in the Trusteeship Agreement.

Because it is possible that we may see this case again, we comment briefly on one issue raised by the defendants. Continental contends that it has acquired some equities by proceeding with the construction of its hotel while its right to do so is being litigated. Unless we misread the argument, Continental seems to be asserting that the damage has been done, and that it is too late for courts to remedy it. We note that Continental initiated bulldozing activities at the Micro Beach without notice and while the High Commissioner supposedly was giving further consideration to the project. The plaintiffs' action was commenced in the High Court almost immediately afterward, and in federal court within one and one-half months. We caution Continental that:

> "* * * [A]fter a defendant has been notified of the pendency of a suit seeking an injunction against him, even though a temporary injunction be not granted, he

> acts at his peril and subject to the power of the court to restore the status, wholly irrespective of the merits as they may be ultimately decided * * *." *Jones* v. *S.E.C.*, 298 U.S. 1, 17 (1936), *quoted in Nat'l Forest Preservation Group* v. *Butz*, 485 F.2d 408, 411 (9th Cir. 1973).

The judgment of dismissal is affirmed as modified.

TRASK, Circuit Judge, Concurring:

I join in the decision of the majority but follow a different course to the common conclusion.

First of all, it appears clear to me that the Charter of the United Nations is not self-executing and does not in and of itself create rights which are justiciable between individual litigants. Although under Article VI of the Constitution[1] treaties are part of the supreme law of the land, it was early held that to be immediately binding upon our courts a treaty must be self-executing. Chief Justice Marshall enunciated this principle in *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829):[2]

> "Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature,

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[1] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI.

[2] The decision in *Foster* was overruled by United States v. Percheman, 32 U.S. (7 Pet.) 51 (1883), in an opinion also written by Chief Justice Marshall when new facts were brought to bear upon the controversy, but the legal principle announced in *Foster* was not undermined. *See* Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 10 (1936); Head Money Cases, 112 U.S. 580, 598-99 (1884); L. Henkin, Foreign Affairs and the Constitution 156-58 (1972); Comment, *Criteria for Self-Executing Treaties*, 1968 U. Ill. L.F. 238, 239.

> whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court."

Unless a treaty is self-executing, in order to be cognizable before the courts it must be implemented by legislation. Otherwise it constitutes a compact between sovereign and independent nations dependent for its recognition and enforcement upon the honor and the continuing self-interest of the parties to it. If, however, the treaty contains language which confers rights or obligations on the citizenry of the compacting nations then, upon ratification, it becomes a part of the law of the land under Article VI. In *Head Money Cases,* 112 U.S. 580 (1884), the Court said:

> "A treaty, then, is the law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute." 112 U.S. at 598-99.

I find nothing in a reading of the Charter and nothing has been called to my attention which would persuade me to believe that the Charter itself creates individual rights which may be enforced in the courts.[3] There is little definitive case law elucidating the issue of self-implementation

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[3] The fact that a treaty was ratified by the President of the United States upon the advice and consent of two-thirds of the Senate, as was the United Nations Charter (Charter of the United Nations, June 26, 1945, 59 Stat. 1031, 1213, T.S. No. 993 (effective Oct. 24, 1945)), makes it a commitment of the nation but does not necessarily impart rights and obligations to individual citizens.

vel non. The appellants have referred to some of the cases in which reference to the Charter has been made.[4]

Those cases are of questionable precedential value. Looking in the opposite direction we find cases that are subject to much the same criticism. The only case which straightforwardly holds in broad terms that the Charter is not self-executing is *Pauling* v. *McElroy*, 164 F. Supp. 390 (D.D.C. 1958), *aff'd per curiam on other grounds*, 278 F.2d 252 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960). The District Court in *Pauling* stated:

"The provisions of the Charter of the United Nations, the Trusteeship Agreement for the Trust Terri-

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[4] In concurring opinions in Oyama v. California, 332 U.S. 633, 649-50, 673 (1948), Justices Black, Douglas, and Murphy intimate that Articles 55 and 56 of the Charter support a position proscribing racial discrimination; a dissenting opinion in Hard v. Hodge, 162 F.2d 233, 245 (D.C. Cir. 1947), *rev'd* 334 U.S. 24 (1948), is much the same. In an appeal from a contempt-of-Congress conviction for the refusal of a United Nations' employee to answer whether anyone had aided her in obtaining employment, Article 105 was discussed but the actual decision was based upon other grounds. Keeney v. United States, 218 F.2d 843, 845 (D.C. Cir. 1954). Diggs v. Schultz, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973), was a case in which the plaintiffs sought relief against the Secretary of the Treasury because of an official authorization of importation of metals contrary to the terms of a United Nations' embargo in which the United States had joined. Relief was denied because of the nonjusticiability of the claim under the separation-of-powers doctrine, although the court did hold that the plaintiffs had standing to litigate the issue of the failure of the defendants to adhere to the Government's treaty obligations. In *Diggs*, however, the relevant provision of the Charter, Article 41, had been implemented by Congress through the enactment of 22 U.S.C. § 287c, which authorizes the President to effectuate Article 41 sanctions and prescribes criminal penalties for those individuals disobeying such Presidential orders. Indeed, pursuant to this statutory authority, the President had issued Executive orders banning the importation of the items in question. Exec. Order No. 11,419, 3 C.F.R. 737 (1966-70 Comp.), 22 U.S.C. § 287c; see Exec. Order No. 11,322, 3 C.F.R. 606 (1966-70 Comp.), 22 U.S.C. § 287c; *see Diggs* v. *Schultz*, 470 F.2d at 463.

tory of the Pacific Islands, and the international law principle of freedom of the seas relied on by plaintiffs are not self-executing and do not vest any of the plaintiffs with individual legal rights which they may assert in this Court. *The claimed violations of such international* obligations and principles may be asserted only by diplomatic negotiations between the sovereignties concerned." 164 F. Supp. at 393.

In *Hitai* v. *Immigration & Naturalization Service*, 343 F.2d 466, 468 (2d Cir. 1965), the court held that Article 55 of the Charter was not self-executing. Both from the standpoint of the inherent nature of treaty obligations and what appears to me to be a plain reading of the language of the Charter, I would hold it to be a compact between sovereign nations neither intending to impart justiciable rights to individuals nor implicitly doing so.

This position is fortified, it would seem, by the very fact that the Charter provided for a system of trusteeship. Chapter XI, which contains Article 73, is a mutual declaration of the members of their responsibilities for the administration of territories whose peoples have not yet attained a complete competence of self-government. Chapter XII and Chapter XIII then provide for the International Trusteeship System for the administration and supervision of those territories. Under those Articles a Trusteeship Agreement was executed between the Security Council of the United Nations and the United States, as administering authority effective July 18, 1947, for the Territory of the Pacific Islands.[5] It provided the United States with the

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[5] Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665. The Agreement was approved by the President on July 18, 1947, pursuant to the authority of a joint resolution of Congress of the same date. 61 Stat. 397 (1947).

authority to enact a comprehensive system of government under Article 6.[6]

Congress has empowered the President with authority for the civil administration of the Territory until Congress itself should further establish a system of government. 48 U.S.C. § 1681. Under this statutory basis, a series of Executive orders delegated responsibility for government to the Department of the Interior, *see* Exec. Order No. 11,021, 3 C.F.R. 600 (1959-63 Comp.), 48 U.S.C. § 1681, and that Department eventually promulgated a single document combining previous orders into one basic order for the Government of the Trust Territory of the Pacific Islands. Dept. of Interior Order No. 2918, Dec. 27, 1968, 34 Fed. Reg. 157 (1969). This consolidated order constituted a mini-organic act creating legislative, executive, and judicial branches of the Government with a Congress, a High Commissioner as the Chief executive, and a High Court of the Trust Territory with a Chief Justice and Associate Justices appointed by the Secretary of the Interior.

I agree with the federal appellees and with the court in *Pauling* v. *McElroy, supra*, that the Trusteeship Agreement is not self-executing.[7] Yet, a series of actions all ultimately

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[6] Trusteeship Agreement, art. 12. Article 6 provides in pertinent part that the administering authority [the United States] shall:

> "1. foster the development of such political institutions as are suited to the trust territory and shall promote the development of the inhabitants of the trust territory toward self-government or independence . . .;
>
> "2. promote the economic advancement and self-sufficiency of the inhabitants . . .;
>
> "3. promote the social advancement of the inhabitants . . .; and
>
> "4. promote the educational advancement of the inhabitants . . . ." 61 Stat. at 3302-03.

[7] The language of the Agreement, and in particular that of Article 6, the specific provision at issue in this suit, evinces a series of general commitments undertaken by the United States in furtherance of particular social objectives. *See* note 6 *supra*. That these phrases may become workable through judicial construction,

founded upon congressional authority have so executed the Agreement that its provisions may now properly be regarded as judicially enforceable. Thus, the Agreement was approved by the President pursuant to a joint resolution of Congress, *see* note 5 *supra*, and implemented by Executive orders promulgated pursuant to congressional authority, 48 U.S.C. § 1681. Finally, the Trust Territory Government, created by the Department of the Interior, has declared the Agreement "to be in full force and to have the effect of law in the Trust Territory." 1 T.T.C. § 101(1).

The Trust Territory Code provides:

> "The Trial Division of the High Court shall have original jurisdiction to try all causes, civil and criminal, including probate, admiralty, and maritime matters and the adjudication of title to land or any interest therein." 5 T.T.C. § 53.

All decisions rendered in such matters are subject to review by the Appellate Division under 55 T.T.C. § 54(1)(a). It thus appears to me as it does to the majority that jurisdiction does lie with the High Court to determine the validity of the lease in accordance with its own law and any other law affecting the lease or the lands to which the lease is applicable. Based upon considerations of comity, I agree that this cause should initially be addressed to the High Court.

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as the majority opines, does not detract from the probability that, had the drafters of the instrument intended the document to have the effect of a statute, more precise language delimiting the rights of Micronesians would have been employed. *Compare* Head Money Cases, 12 U.S. 580, 598-99 (1884); Hauenstein v. Lynham, 100 U.S. 483 (1879). Moreover, the Agreement, in Article 12, states:

> "The administering authority shall enact such legislation as may be necessary to place the provisions of this agreement in effect in the trust territory."

Since, under the Constitution of the "adminstering authority" (the United States), self-executing treaties are effective upon ratification, this provision, as drafted, would not have been necessary had the drafters intended the Agreement to be self-executing.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-1769

THE PEOPLE OF SAIPAN, etc., et al., *Appellants,*

v.

UNITED STATES DEPARTMENT OF INTERIOR, et al.,
Governmental Appellees,

and

CONTINENTAL AIRLINES, INC., a Nevada Corporation,
Corporate Appellee.

Order

Appeal from the United States District Court
for the District of Hawaii.

Before: TRASK and GOODWIN, Circuit Judges, and EAST,* District Judge.

Appellants' petition for rehearing, filed August 16, 1974, is hereby

DENIED.

* The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX C

NATIONAL ENVIRONMENTAL POLICY ACT

(42 U.S.C. §§ 4321-4335; subchapter II omitted)

§ 4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

SUBCHAPTER I.—POLICIES AND GOALS

§ 4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public

laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by subchapter II of this chapter.

§ 4333. Conformity of administrative procedures to national environmental policy

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

§ 4334. Other statutory obligations of agencies

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

§ 4335. Efforts supplemental to existing authorizations

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

APPENDIX D

TRUSTEESHIP AGREEMENT FOR THE FORMER JAPANESE MANDATED ISLANDS

(61 Stat. 3301)

PREAMBLE

WHEREAS Article 75 of the Charter of the United Nations provides for the establishment of an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent agreement; and

WHEREAS under Article 77 of the said Charter the trusteeship system may be applied to territories now held under mandate; and

WHEREAS on 17 December 1920 the Council of the League of Nations confirmed a mandate for the former German Islands north of the equator to Japan, to be administered in accordance with Article 22 of the Covenant of the League of Nations; and

WHEREAS Japan, as a result of the Second World War, has ceased to exercise any authority in these islands;

NOW THEREFORE, the Security Council of the United Nations, having satisfied itself that the relevant articles of the Charter have been complied with, hereby resolves to approve the following terms of trusteeship for the Pacific Islands formerly under mandate to Japan.

ARTICLE 1

The Territory of the Pacific Islands, consisting of the islands formerly held by Japan under mandate in accordance with Article 22 of the Covenant of the League of Nations, is hereby designated as a strategic area and placed under the trusteeship system established in the Charter of the United Nations. The Territory of the

Pacific Islands is hereinafter referred to as the trust territory.

ARTICLE 2

The United States of America is designated as the administering authority of the trust territory.

ARTICLE 3

The administering authority shall have full powers of administration, legislation, and jurisdiction over the territory subject to the provisions of this agreement, and may apply to the trust territory, subject to any modifications which the administering authority may consider desirable such of the laws of the United States as it may deem appropriate to local conditions and requirements.

ARTICLE 4

The administering authority, in discharging the obligations of trusteeship in the trust territory, shall act in accordance with the Charter of the United Nations, and the provisions of this agreement, and shall, as specified in Article 83(2) of the Charter, apply the objectives of the international trusteeship system, as set forth in Article 76 of the Charter, to the people of the trust territory.

ARTICLE 5

In discharging its obligations under Article 76(a) and Article 84, of the Charter, the administering authority shall ensure that the trust territory shall play its part, in accordance with the Charter of the United Nations, in the maintenance of international peace and security. To this end the administering authority shall be entitled:

1. to establish naval, military and air bases and to erect fortifications in the trust territory;

2. to station and employ armed forces in the territory; and

3. to make use of volunteer forces, facilities and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for the local defense and the maintenance of law and order within the trust territory.

ARTICLE 6

In discharging its obligations under Article 76(b) of the Charter, the administering authority shall:

1. foster the development of such political institutions as are suited to the trust territory and shall promote the development of the inhabitants of the trust territory toward self-government or independence as may be appropriate to the particular circumstances of the trust territory and its peoples and the freely expressed wishes of the peoples concerned; and to this end shall give to the inhabitants of the trust territory a progressively increasing share in the administrative services in the territory; shall develop their participation in government; and give due recognition to the customs of the inhabitants in providing a system of law for the territory; and shall take other appropriate measures toward these ends;

2. promote the economic advancement and self-sufficiency of the inhabitants, and to this end shall regulate the use of natural resources; encourage the development of fisheries, agriculture, and industries; protect the inhabitants against the loss of their lands and resources; and improve the means of transportation and communication;

3. promote the social advancement of the inhabitants and to this end shall protect the rights and fundamental freedoms of all elements of the population without discrimination; protect the health of the inhabitants; control

the traffic in arms and ammunition, opium and other dangerous drugs, and alcoholic and other spiritous beverages; and institute such other regulations as may be necessary to protect the inhabitants against social abuses; and

4. promote the educational advancement of the inhabitants, and to this end shall take steps toward the establishment of a general system of elementary education; facilitate the vocational and cultural advancement of the population; and shall encourage qualified students to pursue higher education, including training on the professional level.

ARTICLE 7

In discharging its obligations under Article 76(c), of the Charter, the administering authority shall guarantee to the inhabitants of the trust territory freedom of conscience, and, subject only to the requirements of public order and security, freedom of speech, of the press, and of assembly; freedom of worship, and of religious teaching; and freedom of migration and movement.

ARTICLE 8

1. In discharging its obligations under Article 76(d) of the Charter, as defined by Article 83(2) of the Charter, the administering authority, subject to the requirements of security, and the obligation to promote the advancement of the inhabitants, shall accord to nationals of each Member of the United Nations and to companies and associations organized in conformity with the laws of such Member, treatment in the trust territory no less favourable than that accorded therein to nationals, companies and associations of any other United Nation except the administering authority.

2. The administering authority shall ensure equal treatment to the Members of the United Nations and their nationals in the administration of justice.

3. Nothing in this Article shall be so contrued as to accord traffic rights to aircraft flying into and out of the trust territory. Such rights shall be subject to agreement between the administering authority and the state whose nationality such aircraft possesses.

4. The administering authority may negotiate and conclude commercial and other treaties and agreements with Members of the United Nations and other states, designed to attain for the inhabitants of the trust territory treatment by the Members of the United Nations and other states no less favourable than that granted by them to the nationals of other states. The Security Council may recommend, or invite other organs of the United Nations to consider and recommend what rights the inhabitants of the trust territory should acquire in consideration of the rights obtained by Members of the United Nations in the trust territory.

ARTICLE 9

The administering authority shall be entitled to constitute the trust territory into a customs, fiscal, or administrative union or federation with other territories under United States jurisdiction and to establish common services between such territories and the trust territory where such measures are not inconsistent with the basic objectives of the International Trusteeship System and with the terms of this agreement.

ARTICLE 10

The administering authority, acting under the provisions of Article 3 of this agreement, may accept membership in any regional advisory commission, regional authority, or technical organization, or other voluntary association of states, may cooperate with specialized international bodies, public or private, and may engage in other forms of international cooperation.

ARTICLE 11

1. The administering authority shall take the necesssary steps to provide the status of citizenship of the trust territory for the inhabitants of the trust territory.

2. The administering authority shall afford diplomatic and consular protection to inhabitants of the trust territory when outside the territorial limits of the trust territory or of the territory of the administering authority.

ARTICLE 12

The administering authority shall enact such legislation as may be necessary to place the provisions of this agreement in effect in the trust territory.

ARTICLE 13

The provisions of Articles 87 and 88 of the Charter shall be applicable to the trust territory, provided that the administering authority may determine the extent of their applicability to any areas which may from time to time be specified by it as closed for security reasons.

ARTICLE 14

The administering authority undertakes to apply in the trust territory the provisions of any international conventions and recommendations which may be appropriate to the particular circumstances of the trust territory and which would be conducive to the achievement of the basic objectives of Article 6 of this agreement.

ARTICLE 15

The terms of the present agreement shall not be altered, amended or terminated without the consent of the administering authority.

ARTICLE 16

The present agreement shall come into force when approved by the Security Council of the United Nations and by the Government of the United States after due constitutional process.

42 U.S.C. § 1681(a)

Until Congress shall further provide for the government of the Trust Territory of the Pacific Islands, all executive, legislative, and judicial authority necessary for the civil administration of the Trust Territory shall continue to be vested in such person or persons and shall be exercised in such manner and through such agency or agencies as the President of the United States may direct or authorize.

EXECUTIVE ORDER NO. 11021

(3 C.F.R. 1959-63 Comp. at 600)

WHEREAS the Trust Territory of the Pacific Islands was placed under the trusteeship system established in the Charter of the United Nations by means of a trusteeship agreement approved by the Security Council of the United Nations on April 2, 1947, and by the United States Government on July 18, 1947, after due constitutional process (hereinafter referred to as the trusteeship agreement); and

WHEREAS the United States of America was designated under the terms of the trusteeship agreement as the administering authority of the Trust Territory referred to above (hereinafter referred to as the trust territory); and

WHEREAS the United States has heretofore assumed obligations for the civil administration of the trust territory and has carried out such civil administration

under the provisions of Executive Orders Nos. 9875 of July 18, 1947, 10265 of June 29, 1951, 10408 of November 10, 1952, and 10470 of July 17, 1953; and

WHEREAS thereunder the Secretary of the Navy is now responsible for the civil administration of the Northern Mariana Islands except the Island of Rota and the Secretary of the Interior is responsible for the civil administration of all of the remainder of the trust territory; and

WHEREAS it appears that the purposes of the trusteeship agreement can best be effectuated at this time by placing in the Secretary of the Interior responsibility for the civil administration of all of the trust territory:

NOW, THEREFORE, by virtue of the authority vested in me by the Act of June 30, 1954 (68 Stat. 330: 48 U.S.C. 1681) and as President of the United States, it is ordered as follows:

Section 1. Responsibility of Secretary of the Interior. The responsibility for the administration of civil government in all of the trust territory, and all executive, legislative, and judicial authority necessary for that administration, are hereby vested in the Secretary of the Interior. Subject to such policies as the President may from time to time prescribe, and in harmony with applicable law, and, where advantageous, in collaboration with other departments and agencies of the Government, the Secretary of the Interior shall take such actions as may be necessary and appropriate to carry out the obligations assumed by the United States as the administering authority of the trust territory under the terms of the trusteeship agreement and under the Charter of the United Nations: *Provided however,* That the authority to specify parts or all of the trust territory as closed for security reasons and to determine the extent to which Articles 87 and 88 of the Charter of the United Nations shall be applicable to such closed areas, in accordance with Article 13 of the trustee-

ship agreement, shall be exercised by the President: *And provided further,* That the Secretary of the Interior shall keep the Secretary of State currently informed of activities in the trust territory affecting the foreign policy of the United States and shall consult with the Secretary of State on questions of policy concerning the trust territory which relate to the foreign policy of the United States, and that all relations between the departments and agencies of the Government and appropriate organs of the United Nations with respect to the trust territory shall be conducted through the Secretary of State.

Section 2. Redelegation of authority. The executive, legislative, and judicial authority provided for in section 1 of this order may be exercised through such officers or employees of the Department of the Interior, or through such other persons under the jurisdiction of the Secretary of the Interior, as the Secretary may designate, and shall be exercised in such manner as the Secretary, or any person or persons acting under the authority of the Secretary, may direct or authorize.

Section 3. Cooperation with Department of the Interior. The executive departments and agencies of the Government shall cooperate with the Department of the Interior in the effectuation of the provisions of this order.

Section 4. Prior Orders. To the extent not heretofore superseded or otherwise rendered inapplicable, the following are hereby superseded:

(1) Executive Order No. 10265 of June 29, 1951.

(2) Executive Order No. 10408 of November 10, 1952.

(3) Executive Order No. 10470 of July 17, 1953.

Section 5. Saving provisions. (a) Existing laws, regulations, orders, appointments, or other acts promulgated, made, or taken by the Secretary of the Interior or his delegates under the authority of Executive Order No.

10265, as amended and in effect immediately prior to the effective date of this order, shall remain in effect until they are superseded in pursuance of the provisions of this order.

(b) Nothing contained in this order shall be construed as modifying the rights or obligation of the United States under the provisions of the trusteeship agreement or as affecting or modifying the responsibility of the Secretary of State to interpret the rights and obligations of the United States arising out of that agreement.

Section 6. Effective date. The provisions of this order shall become effective on July 1, 1962.

/s/ JOHN F. KENNEDY

The White House
May 7, 1962.

DEPARTMENT OF THE INTERIOR ORDER NO. 2918

WHEREAS, pursuant to the Trusteeship Agreement between the United States and the Security Council of the United Nations, the United States has undertaken to promote self-government in the Trust Territory of the Pacific Islands; and

WHEREAS, Department of the Interior Order No. 2876 of January 30, 1964, as amended, set forth the extent and nature of the authority of the Government of the Trust Territory of the Pacific Islands; and

WHEREAS, Department of the Interior Order No. 2882 of September 28, 1964, as amended, created the Congress of Micronesia and granted legislative authority thereto; and

WHEREAS, it is appropriate that the two aforesaid basic Orders, as amended, be modified in minor particulars, consolidated in one basic order, and reissued, with all amendments therein incorporated,

NOW THEREFORE, the following single basic Order respecting the Government of the Trust Territory of the Pacific Islands is issued:

PART I. PURPOSE

The purpose of this Order is to delimit the extent and nature of the authority of the Government of the Trust Territory of the Pacific Islands (hereinafter called "the Trust Territory"), as it will be exercised under the jurisdiction of the Secretary of the Interior (hereinafter called "the Secretary"), pursuant to Executive Order No. 11021 of May 7, 1962, and to prescribe the manner in which the relationships of the Government of the Trust Territory shall be established and maintained with the Congress, the Department of the Interior and other Federal agencies, and with foreign governments and international bodies.

Part II. EXECUTIVE AUTHORITY

Section 1. The executive authority of the Government of the Trust Territory, and the responsibility for carrying out the international obligations undertaken by the United Nations with respect to the Trust Territory, shall be vested in a High Commissioner of the Trust Territory and shall be exercised and discharged under the supervision and direction of the Secretary.

The Secretary shall appoint a Deputy High Commissioner, who shall have all the powers of the High Commissioner in the case of a vacancy in the office of High Commissioner or the disability or temporary absence of the High Commissioner.

Section 2. The relations of the Government of the Trust Territory with the Congress of the United States on all legislative matters, including appropriations, shall be conducted through the Department of the Interior.

Section 3. With freedom to consult directly with the Secretary when necessary, the High Commissioner of the

Trust Territory shall normally communicate with the Secretary of the Interior through the Director of the Office of Territories. The High Commissioner shall be responsible for all United States property in the Trust Territory which is required for the operation of the Government of the Trust Territory and for which the Department of the Interior has administrative responsibility. The High Commissioner shall perform such other functions for the Department of the Interior in the Trust Territory as may be delegated to him by the Secretary.

Section 4. Initial contact by the Government of the Trust Territory with Federal agencies outside the Department of the Interior on other than routine matters shall be established through the Office of Territories of the Department of the Interior. Once the relationship has been established, direct contact between the Government of the Trust Territory and the Federal agencies concerned may be maintained, in which event the Office of Territories shall be kept informed of significant developments in the relationship.

Section 5. Communications of the Government of the Trust Territory with foreign governments and international bodies shall be cleared through the Department of the Interior for transmittal by the Department of State, unless some other procedure is approved by the Secretary of the Interior.

Section 6. In exercising his authority the High Commissioner shall obtain prior Secretarial approval of any significant deviation from the budget justification presented to the Congress, and any significant transfer of funds between programs or between administration and construction funds.

PART III. LEGISLATIVE AUTHORITY

Section 1. *Organization.* The Legislature of the Trust Territory of the Pacific Islands shall be known as the

"Congress of Micronesia" and shall consist of two Houses, the Senate and the House of Representatives. The two Houses shall sit separately except as otherwise provided herein.

When the Congress shall convene, each House shall organize by the election of one of its number as presiding officer and such presiding officer shall be designated by the title of "President of the Senate" or "Speaker of the House of Representatives," as the case may be. When the Congress meets in joint session, the Speaker of the House of Representatives shall preside.

Section 2. *Legislative Power.* The legislative power of the Congress of Micronesia shall extend to all rightful subjects of legislation, except that no legislation may be inconsistent with

(a) treaties or international agreements of the United States;

(b) laws of the United States applicable to the Trust Territory;

(c) Executive Orders of the President of the United States and orders of the Secretary of the Interior; or

(d) Sections 1 through 12 of the Code of the Trust Territory.

No law shall be passed by the Congress imposing any tax upon property of the United States or property of the Trust Territory of the Pacific Islands; nor shall the property of nonresidents be taxed at a higher rate than the property of residents. No import or export levies shall be imposed on goods transported between or among the Districts of the Trust Territory, as described in Section 39 of the Code of the Trust Territory, or any political subdivision thereof, and the levy of duties on goods imported

into the Trust Territory is hereby reserved to the Congress of Micronesia and the High Commissioner.

Section 3. *Powers of the High Commissioner.* At the opening of a legislative session and at any time thereafter the High Commissioner may submit to the Congress and recommend the enactment of legislation.

Section 4. *Budget.* Money bills enacted by the Congress of Micronesia shall not provide for the appropriation of funds in excess of such amounts as are available from revenues raised pursuant to the tax laws and other revenue laws of the Trust Territory: *Provided,* That the Secretary of the Interior shall, from time to time, define the term 'revenue' as used herein, so as generally to exclude therefrom all sums attributable to user charges or service related reimbursements to the Government of the Trust Territory. Prior to his final submission to the Secretary of the Interior of requests for Federal funds necessary for the support of governmental functions in the Trust Territory, the High Commissioner shall prepare a preliminary budget plan. He shall submit such plan to the Congress of Micronesia in joint session for its review and recommendations with respect to such portions as relate to expenditures of funds proposed to be appropriated by the Congress of the United States. With respect to such portions of the preliminary budget plan, the High Commissioner shall adopt such recommendations of the Congress as he may deem appropriate, but he shall transmit to the Secretary of the Interior all recommendations he has not adopted.

Section 5. *Membership.* For the purpose of representation in the Congress, the Trust Territory is divided into six districts as described in Section 39 of the Code of the Trust Territory.

The Senate shall consist of twelve members, who shall be known as "Senators," of which each District shall elect two.

The House of Representatives shall consist of twenty-one members, who shall be known as "Representatives," and who shall be elected from each District as follows:

In the Mariana Islands District, three;

In the Marshall Islands District, four;

In the Palau District, three;

In the Ponape District, four;

In the Truk District, five;

In the Yap District, two.

Each of the six Administrative Districts shall be subdivided initially into single member election districts of approximately equal population, in such manner as the High Commissioner shall determine, and each such election district shall elect one of the Representatives to which the Administrative District is entitled. Future subdivisions shall be established by law.

Election districts shall be reapportioned every 10 years on the basis of population, but each District (as described in Section 39 of the Trust Territory Code), shall be entitled to at least two representatives. The first such reapportionment shall be made in 1971.

Section 6. Qualification of Legislators. In order to be eligible to election as a member of the Congress a person shall:

(a) be a citizen of the Trust Territory for at least five years;

(b) have attained the age of twenty-five years at the time of his election; and

(c) have been a bona fide resident of the District (as described in Section 39 of the Code of the Trust Territory), from which he is elected for at least one year next preceding his election.

No person who has been expelled from the Congress for giving or receiving a bribe or for being an accessory thereto, and no person who has been convicted of a felony by any court of the Trust Territory, a court of one of the States of the United States, or any court with the jurisdiction of a district court of the United States, shall sit in the Congress unless the person so convicted has received a pardon restoring his civil rights.

Section 7. Franchise. The franchise shall be vested in residents of the Trust Territory who are citizens of the Trust Territory and eighteen years of age or over. Additional qualifications may be prescribed by the Congress: *Provided*, That no property, language, or income qualification shall ever be imposed or required of any voter, nor shall any discrimination in qualification be made or based upon literacy, tribal custom, or social position, nor upon difference in race, color, ancestry, sex or religious belief.

Section 8. General Elections. General elections shall be held biennially in each even-numbered year on the first Tuesday following the first Monday in November: *Provided*, That in the event of a natural disaster or other Act of God, the effect of which precludes holding the election on the foregoing date, the High Commissioner, with the approval of the Secretary of the Interior, may proclaim a later election date in the affected election district or districts. All elections shall be held in accordance with such procedures as this order and the laws of the Trust Territory may prescribe. Legislators shall be chosen by secret ballot of the qualified electors of their respective district.

Section 9. Term of Office. Each Senator shall hold office for a term of four years.

Representatives shall each hold office for a term of two years.

The terms of all members of the Congress shall commence at noon on the third day of January following their election, except as otherwise provided by law.

Section 10. Disqualification of Government Officers and Employees. Any person employed by any branch of the Government of the Trust Territory, or any political subdivision thereof, shall be accorded leave without pay, for a period not to exceed 30 days prior to and including the day of the election, for the purpose of seeking election to the Congress. If any such person is elected, he shall resign from his employment with the Government of the Trust Territory, or any political subdivision thereof, prior to the date upon which his term of office commences.

No person serving as a member of a legislative body of any political subdivision of the Government of the Trust Territory shall be eligible, while so serving, to serve as a member of the Congress of Micronesia.

No member of the Congress shall receive any compensation, other than that provided for in this order, from the Government of the Trust Territory or any political subdivision thereof.

Section 11. Sessions. There shall be a regular session of the Congress held in each year beginning on the second Monday of July and continuing for not to exceed 45 consecutive calendar days. In each odd numbered year there shall also be a regular session of the Congress beginning on the second Monday in January and continuing for not to exceed 15 consecutive calendar days.

The High Commissioner may call special sessions for such period of time and at such time and place, as in his opinion the public interest may require. No legislation shall be considered at any special session other than that specified in the call therefor or in any special message by the High Commissioner to the Congress while in such session.

Section 12. Enacting Clause. The enacting clause of all bills shall be: "Be it enacted by the Congress of Micronesia," and no law shall be enacted except by bill. Bills

may originate in either House, and may be amended or altered or rejected by the other.

Section 13. VETO BY THE HIGH COMMISSIONER. Every bill passed by the Congress shall, before it becomes a law, be presented to the High Commissioner. If the High Commissioner approves the bill, he shall sign it. If the High Commissioner disapproves the bill, he shall, except as hereinafter provided, return it, with his objections, to the Congress within ten consecutive calendar days after it shall have been presented to him. If the High Commissioner does not return the bill within such period, it shall be a law in like manner as if he had signed it, unless the Congress by adjournment prevents its return, in which case it shall be a law if signed by the High Commissioner within thirty days after it shall have been presented to him; otherwise it shall not be a law.

When a bill is returned by the High Commissioner to the Congress with his objections, each House may proceed to reconsider it. If the bill is repassed by both Houses of the Congress by a two-third's majority of the entire membership of each House, it shall again be presented to the High Commissioner. If he does not approve it within 20 days, he shall send it together with his comment thereon to the Secretary of the Interior. Within 90 days after its receipt by him, the Secretary of the Interior shall either approve or disapprove the bill. If he approves it, it shall become a law; otherwise it shall not. The foregoing provision shall not preclude the reconsideration by the Congress during either of the 1969 regular Sessions of any bill returned by the High Commissioner during the 1968 Session.

If any bill presented to the High Commissioner shall contain several items of appropriation of money, he may object to one or more of such items, or any part or parts thereof, while approving the other items or parts of the

bill. In such case he shall append to the bill, at the time of signing it, a statement of the item or items, part or parts thereof, to which he objects, and the item or items, part or parts thereof, so objected to shall have the effect of being vetoed.

Section 14. Adjournment. Neither House may adjourn for more than two consecutive days nor may either House adjourn *sine die* without the concurrence of the other House.

Section 15. Publication of Laws. The High Commissioner shall cause the resolutions and laws to be published within 30 days after they become law, and shall make provision for their distribution to public officials and sale to the public.

Section 16. Procedure.

(a) Quorum. A majority of the members of each House shall constitute a quorum of such House for the transaction of business. A smaller number may adjourn from day to day and may compel the attendance of absent members in such manner and under such penalties as each House may provide.

(b) Reading of Bills—Passage. A bill in order to become a law shall pass two readings in each House, on separate days, the final passage of which in each House shall be by a majority vote of all the members of such House, which vote shall be entered upon the journal.

(c) Title. Every legislative act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such an act shall be void only as to so much thereof as shall not be embraced in the title.

(d) Certification of Bills from one House to the other. Every bill when passed by the House in which it

originated, or in which amendments thereto shall have originated, shall immediately be certified by the presiding officer and sent to the other House for consideration.

(e) AMENDMENT AND REVISIONS BY REFERENCE. No law shall be amended or revised by reference to its title only; but in such case the act, as revised, or section or subsection as amended, shall be re-enacted and published at full length.

(f) LANGUAGE. All legislative proceedings shall be conducted in the English language: *Provided*, That knowledge of the English language shall not be a qualification for membership in the Congress. Nothing herein shall limit the right of a member to use his native language if he lacks fluency in English, and the Congress shall provide for interpretation into English in such cases.

(g) JOURNAL. Each House shall keep a journal of its proceedings, and publish the same in English.

(h) PUBLIC SESSIONS. The business of the Congress, and of the Committee of the Whole, shall be transacted openly and not in secret session.

(i) PROCEDURAL AUTHORITY. The Congress shall be the sole judge of the elections and qualifications of its members, shall have and exercise all the authority and attributes inherent in legislative assemblies, and shall have the power to institute and conduct investigations, issue subpoenas to witnesses and other parties concerned, and administer oaths.

Section 17. IMMUNITY. No member of the Congress of Micronesia shall be held to answer before any tribunal other than the Congress for any speech or debate in the Congress, and the members shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest during their attendance at the sessions of the Congress and in going to and from the same.

Section 18. Compensation and Expenses. Each member of the Congress shall be entitled to receive an annual salary of $3,500, and the President of the Senate and the Speaker of the House of Representatives shall each be entitled to receive an additional $500, all of which amounts shall be payable from funds appropriated by the Congress of the United States, when such funds are appropriated pursuant to estimates submitted by the Secretary of the Interior. Each member shall also be entitled to receive, from funds available to and appropriated by the Congress of Micronesia, travel expenses, an expense allowance, and per diem at the standard Trust Territory Government rates for each day the member is in a travel status to and from sessions of the Congress, while in session, or while on other official legislative business. Per diem shall not be payable to members of the Congress for a regular or a special session when such session is held on the island of their residence. The term "official legislative business" shall mean only legislative business authorized by the Chairman of the pertinent Committee of the Congress of Micronesia and performed by one or more members of that Committee, as designated by the Chairman. Travel shall be performed by the most expeditious and direct means: *Provided*, That compensation, travel, expense allowances, and per diem shall not be allowed in excess of such amounts as may be budgeted therefor.

Section 19. Compensation and Expenses, Interim Provision. Effective for the period beginning January 1, 1, 1969, and ending June 30, 1969, members and officers of the Congress of Micronesia shall be entitled to compensation, travel expenses, an expense allowance, and per diem at the rates prescribed in Section 18 of this order, but all such compensation, travel, expense allowances, and per diem shall be paid from funds available to and appropriated by the Congress of Micronesia.

Section 20. Appointment to new Offices. No member of the Congress shall, during the term for which he was elected or during the year following the expiration of the term for which he was elected, be appointed to any office which was created by the Congress during such term.

Section 21. Vacancies. Whenever, prior to six months before the date of the next general election, a vacancy occurs, the High Commissioner shall call a special election to fill such vacancy. In case of a vacancy occurring within six months of the next general election, no special election shall be held and the District Administrator of the District wherein such vacancy arises may fill such vacancy by appointment.

Section 22. Conversion into a Unicameral Body. At its July 1969 regular session, the Congress shall convene in joint session to consider whether the bicameral legislature should be continued, or whether the legislature should be converted into a unicameral body. The final recommendation to the High Commissioner shall be adopted by a majority vote, and the recommendation shall be submitted to the High Commissioner and by him to the Secretary of the Interior.

Section 23. Legislative Counsel. The Congress of Micronesia may by joint resolution nominate a legislative counsel of its own choosing. The salary and other benefits available to such legislative counsel shall be established and paid by the Congress of Micronesia. The Congress of Micronesia may make budgetary provision for such supporting staff for the legislative counsel and the legislature as it may deem necessary.

Section 24. Amendment. This Part may be amended only by further order of the Secretary of the Interior. The Congress may, during any regular session, by a two-thirds majority vote of the membership of each House, recommend to the High Commissioner the amendment of any Section of this Part. The High Commissioner shall

transmit such recommendation, together with his own recommendations thereon, to the Secretary of the Interior.

PART IV. JUDICIAL AUTHORITY

The judicial authority of the Government of the Trust Territory shall be vested in a High Court for the Trust Territory and such other courts as may be established pursuant to law. The Secretary shall appoint the Chief Justice and Associate Justices of the High Court, may make temporary appointments when a vacancy exists, and in addition may appoint temporary judges to serve on the High Court. The judicial authority shall be independent of the executive and legislative powers. Budgetary requests for the territorial judiciary, with supporting justification, shall be drawn up by the Chief Justice of the Trust Territory and submitted for the approval of the Department of the Interior by the High Commissioner of the Trust Territory as a separate item in the annual budget for the Trust Territory. The High Commissioner should call the attention of the Secretary to any question which he may have regarding the budget for the judiciary.

PART V. GENERAL

PRIOR ORDERS. Department of the Interior Order No. 2876 of January 30, 1964, as amended, and Department of the Interior Order No. 2882 of September 28, 1964, as amended, are hereby superseded. Except for Order No. 2902 dated November 15, 1967, as amended, provisions of other prior orders of the Department of the Interior, insofar as they are inconsistent with the provisions of this order, are hereby superseded. Existing laws, regulations, orders, appointments, or other acts in effect immediately prior to the effective date of this order shall remain in effect until they are superseded pursuant to the provisions of this order.

/s/ STEWART L. UDALL
Secretary of the Interior

December 27, 1968

ORDER NO. 2918, AMENDMENT No. 1

WHEREAS, on December 27, 1968 the Secretary of the Interior promulgated Secretarial Order No. 2918 relating to the Government of the Trust Territory of the Pacific Islands; and

WHEREAS, the said Order No. 2918 in Section 4 of Part III limited the appropriation of funds by the Congress of Micronesia to those amounts available from revenues raised pursuant to the tax laws and other revenue laws in the Trust Territory; and

WHEREAS, Section 11 of Part III provided that regular sessions of the Congress of Micronesia were to be held in July of each year and January of alternate years; and

WHEREAS, Section 13 of Part III establishes the procedure for approval and disapproval of laws passed by the Congress of Micronesia; and

WHEREAS, Section 16 (e) of Part III relates to amendment and revision of legislation by reference; and

WHEREAS, Section 18 of Part III provides for the salary and expenses of members of the Congress of Micronesia; and

WHEREAS, certain revisions in Sections 1 and 3 of Part III are also desirable to clarify the organization of the Congress of Micronesia and the submission of legislation to the Congress of Micronesia by the High Commissioner prior to a legislative session.

NOW THEREFORE, Secretarial Order No. 2918 is amended in the following particulars, the amendments to be effective as of the date of this Amendment except as otherwise provided:

1. The second paragraph of Section 1 of Part III of the said Order No. 2918 is hereby amended to read as follows:

"When a Congress convenes, each House shall organize by the election of one of its number as presiding officer

and such presiding officer shall be designated by the title of 'President of the Senate' or 'Speaker of the House of Representatives,' as the case may be. When the Congress meets in joint session, the Speaker of the House of Representatives shall preside."

2. Section 3 of Part III of the said Order No. 2918 is hereby amended to read as follows:

"Section 3. POWERS OF THE HIGH COMMISSIONER. The High Commissioner may submit to the Congress prior to and during any legislative session legislation for its consideration."

3. Section 4 of Part III of the said Order No. 2918 is hereby amended to read as follows:

"Section 3. BUDGET. Money bills enacted by the Congress of Micronesia shall not provide for the appropriation of funds in excess of such amounts as are available or estimated to be available from revenues raised pursuant to the tax laws and other revenue laws of the Trust Territory: PROVIDED, that the Secretary of the Interior shall, from time to time, define the term 'revenue' as used herein, so as generally to exclude therefrom all sums attributable to user charge or service related reimbursements to the Government of the Trust Territory."

"Prior to his final submission to the Secretary of the Interior of requests for Federal funds necessary for the support of governmental functions in the Trust Territory, the High Commissioner shall prepare a preliminary budget plan. He shall submit such plan to the Congress of Micronesia or the appropriate authorized committee or committees thereof for its review and recommendations with respect to such portions as relate to expenditures of funds proposed to be appropriated by the Congress of the United States. With respect to such portions of the preliminary budget plan, the High Commissioner shall adopt such rec-

ommendations of the Congress or the appropriate authorized committee or committees thereof as he shall deem appropriate, but he shall transmit to the Secretary of the Interior all recommendations he has not adopted."

"For Fiscal Years 1971 and 1972, the Congress of Micronesia is authorized $125,000 from Federal grants appropriated to the Trust Territory of the Pacific Islands by the Congress of the United States, for operation and expenses of the Congress of Micronesia. For succeeding fiscal years, the Congress of Micronesia may request continuing or additional funds for its operations and expenses. Such requests shall be incorporated in the High Commissioner's preliminary budget plan for processing as set forth in this section."

4. The first paragraph of Section 11 of Part III of the said Order No. 2918 is hereby amended to read as follows, such amendment to become effective January 1, 1971:

"Section 11. SESSIONS. There shall be a regular session of the Congress held in each year beginning on the second Monday in January and continuing for not to exceed 50 consecutive calendar days."

5. Section 13 of Part III of the said Order No. 2918 is hereby amended to read as follows, such amendment to become effective January 1, 1971:

"Section 13. APPROVAL OR DISAPPROVAL BY THE HIGH COMMISSIONER. Every bill passed by the Congress shall be certified by the presiding officers and clerks of both Houses and shall thereupon be presented to the High Commissioner. he approves, he shall sign the bill and it shall become law. If the High Commissioner disapproves, he shall so indicate and return it with his objections to the Congress within ten consecutive calendar days after it shall have been presented to him. If the High Commissioner takes no action and does not return the bill within such period, it shall be a law in like manner as if he had signed it, unless the Congress by adjournment prevents its return.

The High Commissioner shall have 30 days to consider bills presented to him less than ten days before adjournment or presented after adjournment. If he approves, he shall sign the bill and it shall become law. If the High Commissioner disapproves, he shall so indicate and return it with his objections to the Congress within thirty consecutive calendar days after it shall have been presented to him. If the High Commissioner takes no action and does not return the bill within such period, it shall be a law in like manner as if he had signed it.

When a bill is disapproved and returned by the High Commissioner to the Congress with his objections, each House may proceed to reconsider it. If such a bill is repassed by both Houses of the Congress by a two-thirds majority of the entire membership of each House (one reading being required in each House for such passage), it shall be presented again to the High Commissioner. If he does not approve it within twenty days after presentation, he shall send it together with his comments thereon to the Secretary of the Interior. Within sixty day after its receipt by him, the Secretary of the Interior shall either approve or disapprove the bill. If he approves it, it shall become a law; otherwise it shall not.

If any bill presented to the High Commissioner shall contain several items of appropriation of money, he may object to one or more such items, or any part or parts thereof, while approving the other items or parts of the bill. In such case he shall append to the bill, at the time of signing, a statement of the item or items, part or parts thereof, so objected to, and the item or items, part or parts thereof so objected to shall have the effect of being vetoed."

6. Section 16 (e) of Part III of the said Order 2918 is hereby amended to read as follows, such amendment to become effective January 1, 1971:

"Section 16(e). AMENDMENT AND REVISION BY REFERENCE PROHIBITED. No law or section of the law shall be amended

or revised by reference to its title only, but in every instance such amendment or revision of the law or section thereof shall be published at full length and in its entirety as amended or revised and shall be re-enacted."

7. Section 18 of Part III of the said Order No. 2918 is hereby amended to read as follows:

"Section 18. Compensation and Expenses. The members of the Congress of Micronesia shall receive compensation for their services and expenses as may be prescribed by law. Such compensation and expenses shall be from funds available to and appropriated by the Congress of Micronesia. The Congress may at no time increase the salaries of the incumbents during the current Congress. If the Congress of Micronesia should provide for an increase in the annual compensation paid to members for their services such increase will apply to succeeding Congresses only. Per diem, if paid to the members of Congress, shall be in compliance with the standard Trust Territory rates. Compensation, expenses, per diem, etc., shall not be allowed in excess of such amounts as may be budgeted therefor."

8. Section 21 of Part III of the said Order No. 2918 is hereby amended to read as follows, said amendment to become effective January 1, 1971:

"Section 21. Vacancies.

(a). Whenever a vacancy in the membership of the House of Representatives occurs, the Speaker of the House of Representatives shall notify the High Commissioner and the High Commissioner shall then call a special election to fill such vacancy: Provided, that no special election shall be held if such vacancy occurs less than ninety days prior to the next succeeding general election.

(b). Whenever a vacancy in the membership of the Senate occurs, the President of the Senate shall notify the High Commissioner. If a vacancy occurs sixty days or

more prior to the next succeeding general election, the High Commissioner shall make temporary appointment to fill such vacancy. The appointee shall be from the same administrative district as the person whom he succeeds and shall serve until the next succeeding general election at which time he shall be replaced by a regularly elected Senator who, unless the term of the person he succeeds shall have expired at the time of such election, shall serve only for the unexpired term of such person. In the event the election is for an unexpired term only, the High Commissioner shall issue a proclamation designating the election for the filling of such unexpired term."

9. Sections 19-23 [illegible] 123 of Part III of the said Order No. 2918 are hereby repealed in their entirety.

/s/ WALTER J. HICKEL
Secretary of the Interior

August 13, 1970